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JOHN T. FEY, C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

NO. 656

In re: Attachment for Contempt of
DAVID W. MACK, ROBERT PURDY, DON BINDYKE,
WILLIAM BLOCK, JAMES G. KLINGENSMITH,
VINCE JOHNSON and ANDREW BERNHARD,
Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of Pennsylvania, entered in the above-entitled case on October 5, 1956.

CITATIONS TO OPINIONS BELOW

The opinions of the justices of the Supreme Court of Pennsylvania are reported in 386 Pa. 251, 126 A.2d 679, and are printed in the Appendix hereto, p. 2 et seq., the majority opinion at p. 2, the opinion of Mr. Justice Bell concurring in part and dissenting in part at p. 10, and the dissenting opinion of Mr. Justice Musmanno at p. 18. The opinion of the Court of Quarter Sessions of the Peace and the Court of Oyer and Terminer of Westmoreland County, Pennsylvania, is unreported and is printed in the Appendix, p. 61.

JURISDICTION

The judgment of the Supreme Court of Pennsylvania was entered on October 5, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3) (1952), since a right and privilege is specially set up and claimed under the Constitution of the United States.

QUESTIONS PRESENTED

A rule of a Pennsylvania lower court prohibited the taking of any photographs in the courthouse within forty feet of the entrance to any courtroom, immediately preceding or during sessions of court or recesses, and the photographing of any prisoner on his way to or from court. Petitioners, all newspapermen or news photographers, photographed, or arranged for the photographing, of a defendant in a notorious murder case, outside of the courtroom, while he was on his way to and from court for sentencing. The questions presented are:

1. Whether the gathering of news by photographing newsworthy events or persons is constitutionally protected under the Fourteenth Amendment from unreasonable state interference.
2. Whether the peaceable and unobtrusive taking of news photographs outside a courtroom when the court is not in session presents such clear and imminent danger to the dignity and order of the court that a state court may constitutionally prohibit it.
3. Whether a state court, in order to insulate a convicted murderer from publicity, may constitutionally prohibit the peaceable and unobtrusive taking of news photographs of such prisoner outside the courtroom when court is not in session.

CONSTITUTIONAL PROVISIONS AND STATE REGULATION INVOLVED

The provisions of the Constitution of the United States which are involved are the First and Fourteenth Amendments, the pertinent portions of which are as follows:

"Amendment I

Congress shall make no law . . . abridging the freedom of speech, or of the press . . ."

"Amendment XIV

Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law . . ."

The regulation of the Court of Quarter Sessions of Westmoreland County, Pennsylvania, which is involved is as follows:

"(a) No pictures or photographs shall be taken, immediately preceding or during sessions of this court or recesses between sessions, in any of the court rooms or at any place in the court house within forty feet of the entrance to any court room.

(b) No court proceeding shall be broadcast or televised.

(c) No pictures or photographs of any party to a civil or criminal action, juror or witness, shall be taken in the Law Library or in any office or other room of the court house, except with the knowledge and consent of the person or persons photographed.

(d) No prisoner or inmate of the county jail shall be photographed in the jail or on his way to or from a session of court."—Rule 6084.

STATEMENT OF THE CASE

Petitioners seek review of the judgment of the Supreme Court of Pennsylvania affirming their summary conviction for criminal contempt of the Courts of Quarter Sessions of the Peace and Oyer and Terminer of Westmoreland County, Pennsylvania.

On February 25, 1954, on the eve of the trial for murder of one John Wesley Wable, the so-called "Turnpike phantom killer,"[1] the courts of Westmoreland County entered an order, the effect of which was to forbid the photographing of any persons involved in trials in the several courts. Following a trial which began on March 1, 1954 and was attended by great publicity, Wable was convicted.

On May 12, 1954, the Westmoreland County courts adopted an amended order concerning photographs, for violation of which petitioners were subsequently convicted. That order, known as Rule 6084, provided, in part, as follows:

"(a) No pictures or photographs shall be taken, immediately preceding or during sessions

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[1] Wable had committed a series of atrocious crimes on the Pennsylvania Turnpike which aroused national public interest. He had murdered two truck drivers, and critically wounded another, while they slept in their parked vehicles on the Turnpike. On October 12, 1953, he was apprehended in New Mexico following the commission of a robbery.

of this court or recesses between sessions in any of the court rooms or at any place in the courthouse within forty feet of the entrance to any court room.

* * * * * * *

"(d) No prisoner or inmate of the county jail shall be photographed in the jail or on his way to or from a session of court."

The sentencing of Wable was scheduled for December 28, 1954 in the courtroom of Judge Bauer on the fourth floor of the Westmoreland County courthouse. The courthouse consists of four stories and contains numerous public offices, in addition to the courtrooms. The fourth floor consists of two courtrooms and other offices separated by a fifty foot corridor and with an open rotunda in the center.

On the morning of December 28, 1954, prior to the opening of court, Wable was brought by deputy sheriffs to the courthouse from the county jail which is connected with the first floor of the courthouse. From the first floor he was taken by elevator to the fourth floor and thence along the corridor to a side door to the courtroom. Following the sentence, and after court had adjourned, Wable was conveyed down the three flights of steps and back to the jail.

As Wable was being led along the fourth floor corridor before sentencing, petitioners Purdy and Bindyke took several photographs of him in the corridor, approximately thirty-five feet from the door to the courtroom. These pictures were taken about five minutes before the sentencing judge entered the courtroom and before court was opened.

Later, after court was closed, petitioners Purdy and Bindyke took other photographs of Wable on the first floor of the courthouse as he was being led from the courthouse.

All of the photographs were taken without causing any commotion or disturbance whatsoever. They were taken with small, fast lens cameras, concealed on the persons of the photographers and without the use of flash bulbs or distracting devices of any kind.

In fact, except for the photographers and their collaborators, no one, including the deputy sheriffs who were escorting Wable, knew that the pictures had been taken until they were printed in the newspapers.

On January 4, 1955, following the publication of the photographs, the Westmoreland court issued an order for attachment for criminal contempt of petitioners. Petitioners, Purdy, Bindyke, Klingensmith and Johnson, had either taken the pictures or participated in the plan to take them. Petitioner Mack was publisher of the Greensburg Daily Tribune and Morning Review which employed Purdy. Petitioners Block and Bernhard were respectively publisher and editor of the Pittsburgh Post-Gazette which employed Bindyke, Klingensmith and Johnson.[2]

At the hearing on April 12, 1955, the court found all of the petitioners guilty of direct criminal contempt. Petitioners Mack, Block and Bernhard were sentenced to pay costs and a fine of $500 each and to five days

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[2] Petitioners Mack, Block and Bernhard had directed the taking of the photographs as a test of the validity of the courts' order. The facts leading up to this action are described later in this petition.

imprisonment. Petitioners Purdy, Johnson, Klingensmith and Bindyke were sentenced to pay costs and a fine of $100 each and to five days imprisonment.

On April 16, 1955, petitioners filed a motion in arrest of judgment. On June 9, 1955, the Westmoreland court entered an opinion and decree dismissing the motion. The opinion and decree is printed in the Appendix hereto, p. 61.

On May 16, 1955 and May 31, 1955, petitioners appealed to the Supreme Court of Pennsylvania. On October 5, 1956, the Supreme Court of Pennsylvania entered its judgment. The majority, speaking through Mr. Justice Arnold, affirmed the convictions, except that it modified the sentences by striking therefrom the provisions for imprisonment. The opinion of the majority is printed in the Appendix hereto, p. 2. Mr. Justice Bell filed a separate opinion, concurring in part and dissenting in part, which opinion is printed in the Appendix, p. 10. Mr. Justice Musmanno filed an opinion, dissenting generally, also printed in the Appendix, p. 18.

On October 13, 1956, petitioners secured a stay of further proceedings from the Supreme Court of Pennsylvania, pending application to this court for certiorari.

HOW FEDERAL QUESTION IS PRESENTED

In the contempt action and in various other proceedings involving the validity of the order of the Westmoreland County courts, petitioners consistently asserted that it was in contravention of the Fourteenth Amendment to the Constitution of the United States.

On March 2, 1954, shortly following the courts' original order banning photography, petitioner Mack and the Greensburg Daily Tribune and Morning Review, of which he was publisher, sought and received a temporary restraining order against its operation in the United States District Court for the Western District of Pennsylvania. The complaint and order were based upon the assertion that the Westmoreland order amounted to a denial of due process and of freedom of speech and of the press. The complaint and order are printed in the Appendix hereto, p. 80.

On March 12, 1954, the District Court filed an opinion and order deferring to the Supreme Court of Pennsylvania jurisdiction to determine the issues, since there was also involved questions of state constitutional law: *Tribune Review Publishing Co. v. Thomas,* 120 F. Supp. 362 (W.D. Pa. 1954). The opinion and order are printed in the Appendix hereto, p. 90.

On March 17, 1954, petitioner Mack and the Tribune Review Publishing Company filed in the Supreme Court of Pennsylvania a petition for a writ of prohibition against the enforcement of the Westmoreland order on the ground, among others, that it contravened the Fourteenth Amendment and deprived petitioners of their right to gather, publish and print news and amounted to

a censorship of the press and a denial of the right of free speech and due process. The petition for writ of prohibition is printed in the Appendix hereto, p. 125.

On June 29, 1954, the Supreme Court of Pennsylvania dismissed the petition for a writ of prohibition on the ground that it did not present a justiciable controversy, pointing out in its opinion that a contempt or other proceeding initiated in the Westmoreland courts would be necessary to test the validity of the order: *Tribune Review Publishing Co. Case,* 379 Pa. 92, 113 A.2d 861 (1954). The opinion of the Supreme Court of Pennsylvania is printed in the Appendix hereto, p. 133. The photographs taken at the sentencing of Wable on December 28, 1954, for which petitioners were convicted, were calculated to provide a test of the order's validity.

At the conclusion of the hearing on their attachment for contempt of the Westmoreland order on April 12, 1955, counsel for petitioners moved to dismiss the attachment on the ground that "the regulation of the Court adopted by the Court of Quarter Sessions of Westmoreland County contravenes the Fourteenth Amendment to the Federal Constitution . . ." The relevant portions of the record in that proceeding are printed in the Appendix hereto, p. 135.

On April 16, 1955, following their summary conviction, petitioners again asserted in their motion in Arrest of Judgment that: "The regulation or rule that the defendants are charged with violating is null and void in that it is contrary to the Constitution of the United States . . ." The motion is printed in the Appendix hereto, p. 137.

The Westmoreland court, in its opinion dismissing the motion in Arrest of Judgment, held that the order was not unconstitutional: Appendix, p. 61.

On appeal to the Supreme Court of Pennsylvania, petitioners presented directly to that Court the following questions:

> "Is the gathering and publishing of news by photograph a freedom guaranteed by the Federal and State Constitutions?"
>
> "Does Rule 205(b), renumbered Rule 6084, of the Westmoreland County courts violate the Fourteenth Amendment to the Constitution of the United States and Article I, Section 7 of the Pennsylvania Constitution?"

The majority of the Supreme Court of Pennsylvania held that the Westmoreland order was not in conflict with the Federal and State Constitutions: Appendix, p. 2.

REASONS FOR GRANTING THE WRIT

The Court should grant certiorari in this case because the Pennsylvania Supreme Court has decided a federal question of substance not heretofore determined by this Court, and has decided it in a way not in accord with applicable principles of law previously established by this Court. The ruling of the Pennsylvania court imposes a drastic limitation upon the freedom of the press to gather and publish news and the determination of the issues can have a far reaching effect upon the relationship between the courts and the press.

Petitioners have been convicted of direct criminal contempt of court for violating a rule which absolutely prohibits the taking of news photographs outside the courtroom under circumstances where there can be no likelihood of photographs detracting from the dignity or decorum of the court or interfering with the orderly administration of justice.

Although the constitutionality of such a prohibition has not previously come before this Court, the Court has laid down rules dealing with the balancing of the right of freedom of the press and the power of courts to limit that freedom in the interest of the administration of justice: *Craig v. Harney,* 331 U.S. 367; *Pennekamp v. Florida,* 328 U.S. 331; *Bridges v. California,* 314 U. S. 252: In these decisions, this Court has formulated the following governing principles:

1. To justify a limitation upon the freedom of the press, there must be a showing of a *clear and present danger* to the administration of justice: *Craig v. Harney,* 331 U.S. 367, 372; *Pennekamp*

v. Florida, 328 U.S. 331, 335; *Bridges v. California,* 314 U.S. 252, 260.

2. A solidity of evidence is required for circumstances to create a clear and present danger to judicial administration: *Pennekamp v. Florida,* 328 U.S. 331, 347.

3. The alleged evil consequence of an unabridged exercise of freedom of the press must be "extremely serious and the degree of imminence extremely high" to justify punishment for contempt: *Pennekamp v. Florida,* 328 U.S. 331, 334; *Bridges v. California,* 314 U.S. 252, 263.

In the face of these principles, the Pennsylvania courts in this case have sanctioned the constitutionality of a prohibition on the taking of news photographs at any place in a courthouse within forty feet of the entrance to a courtroom or at any time of a prisoner or inmate on his way to or from a session of court. This conclusion was reached despite the fact that such photographs were taken with modern photographic equipment, working noiselessly and without flash bulbs, without any commotion or disturbance and even without the knowledge of any person except the photographers.

In so ruling, Pennsylvania has asserted that:

1. The right of freedom of the press is a right of the people generally and may not be invoked by individual representatives of the press, such as petitioners herein: Appendix, pp. 4, 70;

2. The constitutional guarantee of a free press is not abridged by a state regulation which restricts the right of press representatives to gather news at public events: Appendix, pp. 7-8, 75; and

3. The restrictions here involved were reasonable restrictions such as a state may place upon freedom of the press because adopted with the purpose of:

(a) Preserving the dignity and decorum of a court: Appendix, p. 6; or

(b) Insuring the right of privacy of a prisoner: Appendix, p. 8.

The decision of the Pennsylvania courts is thus in conflict with the principles announced by this Court in the following respects:

1. It denies that the gathering of news by taking photographs is entitled to constitutional protection. Photographs of newsworthy subjects and their reproduction in newspapers are an essential part of modern-day publishing and are within the protection of the freedom of the press. This Court has declared that "expression by means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth Amendments:" *Burstyn v. Wilson,* 343 U.S. 495. More recently this Court has said that "the First Amendment draws no distinction between the various methods of communicating ideas:" *Superior Films, Inc. v. Department of Education of the State of Ohio,* 346 U.S. 587.

2. It asserts that the freedom of the press may be limited or interfered with by the state, merely if the state acts from a proper or salutary motive. The court below made no effort to find any clear or present danger to the administration of justice, as required by this Court's decisions: *Craig v. Harney,* 331 U.S. 367; *Pennekamp v. Florida,* 328 U.S. 331; *Bridges v. California,* 314 U.S. 252.

The complete answer is that photographs taken outside the courtroom, certainly with modern, silent photographic equipment, cannot present even a reasonable possibility of interfering with what goes on in the court room.

The suggestion that the rule was necessary to protect the prisoner's right of privacy is similarly unfounded. The idea that a person charged with crime, a public officer or any other person, who, whether voluntarily or involuntarily, becomes newsworthy has a "right of privacy" is in direct conflict with all of the authorities.[3] Any right of privacy of a newsworthy individual is not of such substance as to justify a depriva-

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[3] Warren & Brandeis, *The Right to Privacy,* 4 Harv. L. Rev. 193 (1890) (which gave birth to the doctrine of the right of privacy); RESTATEMENT, TORTS, § 867, comment *c* (1939); Annot., 138 A.L.R. 22 (1942); Annot., 168 A.L.R. 446 (1947); Annot., 14 A.L.R. 2d 750 (1950); 41 AM. JUR., *Privacy,* §§ 1-35 (1942); Leverton v. Curtis Publishing Co., 192 F. 2d 974 (3d Cir. 1951); Elmhurst v. Pearson, 153 F. 2d 467 (D.C. Cir. 1946); Estill v. Hearst Publishing Co., 186 F. 2d 1017 (7th Cir. 1951). In addition, the right of privacy is a purely personal right

tion of the freedom of the press which is so necessary to a well-informed public. In *Craig v. Harney,* 331 U. S. 367, 374, this Court said "A trial is a public event".

Participants in a trial are public figures and the public is entitled to full information concerning them, by photography or otherwise, through the medium of the press.

The constitutional question in this case deals with an aspect of freedom of the press which is presently in nationwide ferment. Its importance will continue to grow, because the use of photographs as a means of presenting news has become as much a part of news reporting as words, written in the case of newspapers and magazines or spoken in the case of radio or television.

In *Bridges v. California,* 314 U.S. 252, this Court, speaking through Mr. Justice Black, spoke of the conflict inherent in a conviction for contempt of a newspaperman for publications concerning a trial and said at page 260:

> "If the inference of conflict raised by the last clause be correct, the issue before us is of the very gravest moment. For free speech and fair trials are two of the most cherished policies of our civilization, and it would be a trying task to choose between

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for invasion of which the Pennsylvania courts have recognized a right to secure redress in damages: Hull v. Curtis Publishing Co., 182 Pa. Super. 86, 125 A. 2d 644 (1956). It is not within the province of a court in the first instance to prohibit, by rule or otherwise, a possible invasion of privacy.

them. But even if such a conflict is not actually raised by the question before us, we are still confronted with the delicate problems entailed in passing upon the deliberations of the highest court of a state. This is not, however, solely an issue between state and nation, as it would be if we were called upon to mediate in one of those troublous situations where each claims to be the repository of a particular sovereign power. To be sure, the exercise of power here in question was by a state judge. But in deciding whether or not the sweeping constitutional mandate against any law 'abridging the freedom of speech or of the press' forbids it, we are necessarily measuring a power of all American courts, both state and federal, including this one."

Respectfully submitted,

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WALTER T. MCGOUGH
GILBERT J. HELWIG

FRED B. TRESCHER
DANIEL J. SNYDER, JR.

FILED
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JOHN T. FEY, Clerk

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APPENDIX

IN THE
SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

In re: Attachment for Contempt of DAVID W. MACK, Appellant	No. 144 March Term, 1955
In re: Attachment for Contempt of ROBERT PURDY, Appellant	No. 145 March Term, 1955
In re: Attachment for Contempt of DON BINDYKE, Appellant	No. 154 March Term, 1955
In re: Attachment for Contempt of WILLIAM BLOCK, Appellant	No. 155 March Term, 1955
In re: Attachment for Contempt of JAMES G. KLINGENSMITH, Appellant	No. 156 March Term, 1955
In re: Attachment for Contempt of VINCE JOHNSON, Appellant	No. 157 March Term, 1955
In re: Attachment for Contempt of ANDREW BERNHARD, Appellant	No. 158 March Term, 1955

Appeals from the Judgment and Sentence of the Court of Quarter Sessions of the Peace and the Court of Oyer and Terminer of Westmoreland County at No. 1 January Term, 1955.

Opinion

ARNOLD, J. Filed October 5, 1956.

The seven defendants severally appeal from judgment and sentence by the court below finding each of them guilty of contempt, and imposing upon each a fine and five days imprisonment in the county jail. The appeals were argued together and will be disposed of in one opinion.

The respective judgments and sentences were sustained by the court below upon findings that defendants violated Westmoreland County rule of court No. 6084. The rule provides:

"(a) No pictures or photographs shall be taken, immediately preceding or during sessions of this court or recesses between sessions, in any of the court rooms or at any place in the court house within forty feet of the entrance to any court room.

"(b) No court proceeding shall be broadcast or televised.

"(c) No pictures or photographs of any party to a civil or criminal action, juror or witness, shall be taken in the Law Library or in any office or other room of the court house, except with the knowledge and consent of the person or persons photographed.

"(d) No prisoner or inmate of the county jail shall be photographed in the jail or on his way to or from a session of court."[1]

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[1] Many federal courts have adopted similar regulations. See Vol. 37, Journal of the American Judicature Society, February 1955. Among these are Colorado, Rule 11; District of Columbia, Rule 95, which is very similar to the Westmoreland County rule; New Mexico,

As set forth in the facts hereunder, we are concerned only with subsections (a) and (d) of the rule, and our decision will be limited to these.

By a verdict of the jury J. Wesley Wable, known as the "Turnpike Killer," had been found guilty of first degree murder with a recommendation of the death penalty. On December 28, 1954, he had been called for sentence by Judge Bauer of the court below, in court room No. 5 on the fourth floor of the court house. This was a matter of common knowledge to the defendants.

The fourth floor consists of an octagonal shaped court room, flanked by the judge's chambers and a 50 foot corridor. The corridor is reached by means of a public elevator and a stairway. Entrance to the court room is from the corridor. Near this court room door the defendants surreptitiously took photographs of Wable and deputy sheriffs as he was being escorted to the court room. Wable, who was manacled to the sheriff, had been conveyed from the county jail to the first floor of the court house, and thence by elevator to the fourth floor. While he and the officers were approaching the entrance to the court room, and within 40 feet thereof, the defendants, by prearrangement each with the others, took the photographs in question.[1a] These were procured without Wable's or the court's consent or knowledge. In fact, the attention of the sheriff and his deputies was distracted by a decoy photographer. The photo-

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Minnesota, Oklahoma (northern, eastern and western districts); Wisconsin, which is substantially similar to the District of Columbia; Kansas; and North Dakota.

[1a] One photograph was also taken on the first floor, after sentence had been imposed upon defendant.

graphs were taken by means of infra red rays not requiring the use of flash bulbs and causing no commotion or noise. The following day these photographs were published by the defendants.

The defendants admit that they committed all of the acts hereinbefore described, and also that these acts were performed by agreement among them. Their plea is in the nature of "confession and avoidance."

The first contention is that the rule of court is in conflict with the federal and state constitutions involving the right of free press. However, as pointed out by Ervin D. Canham, Editor of the Christian Science Monitor, "freedom of the press is not a right of the press. It is a right of the people."[2] By the instant rule the court was attempting to preserve the dignity of the court and the decorum of trial, thereby insuring the orderly administration of justice. To be valid, such rule must be reasonable. Thus in American Communications Assn., C.I.O., v. Douds, 339 U.S. 382, 399, it was held: "When particular conduct is regulated in the interest of public order, and the regulation results in an indirect, conditional, partial abridgement of [freedom of the press] . . ., the duty of the courts is to determine which of these two conflicting interests demands the greater protection under the particular circumstances presented." In Fitzgerald v. Philadelphia, 376 Pa. 375, 387, 102 A. 2d 887, this Court held: " 'Of course, it is accepted constitutional doctrine that these fundamental human rights

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[2] See article by John Ely Burchard, editor, Mid-Century, New York and Cambridge, Mass., Technology Press of M.I.T., 1950, p. 261, "The Social Implications of Scientific Progress."

are not absolute . . . The essential rights of the First Amendment in some instances are subject to the elemental need for order without which the guarantees of civil rights to others would be a mockery.' "

Therefore, whether or not freedom of the press is here involved is immaterial, since such freedom is subject to reasonable rules seeking maintenance of the court's dignity and the orderly administration of justice.

The defendants repeatedly assert that they do not contend for the right to take pictures within the court room, even by the infra red ray method which is accompanied by no display or disorder. But it must be conceded that if we sustain their contention that this rule of court infringes upon their rights of freedom of the press, the court likewise would have no power to forbid the taking of pictures in the court room which were accompanied by no disorder or disturbance. Yet this Court has adopted Rule 223 of the Pennsylvania Rules of Civil Procedure, which has the effect of a statute,[3] and which provides: "During the trial of actions the court shall prohibit the taking of photographs and motion pictures in the court room and the transmission of communications by telegraph, telephone, or radio in or from the court room." In addition, Canon 35 of the American Bar Association reads as follows: "Proceedings in Court shall be conducted with fitting dignity and decorum. The taking of photographs in the Court room, during sessions of the Court or recess between sessions, and the broadcasting of Court proceedings are calculated to detract from the essential dignity of the proceedings,

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[3] Act of June 21, 1937, P.L. 1982, as amended by Act of March 30, 1939, P. L. 14, 17 PS § 61-65.

degrade the Court and create misconceptions with respect thereto in the mind of the public, and should not be permitted."[4]

The Westmoreland County rule incorporates the provisions of Pa. R. C. P. 223 (b), and then proceeds to state further restrictions and limitations by it deemed proper and necessary to preserve the dignity of the court and the decorum of trial. The taking of a picture of a person called for sentence certainly does not inform the public as to any material facts, and serves no purpose except to pander to the lower tastes of some individuals. Court rooms and court houses are not places of entertainment, and trials are not had for the purpose of satisfying any sadistic instinct of the public seeking sensationalism.

The fact that the contempt in this case did not occur in the court room, but in the precincts of the court, does not make the rule unreasonable. ". . . the Court, at least when in session, is present in every part of the place set apart for its own use, and for the use of its officers, jurors and witnesses; and misbehavior anywhere in such place is misbehavior in the presence of the court": Ex

[4] This Canon has been approved by state courts and state bar associations.

The Federal Rules of Criminal Procedure promulgated by the Supreme Court of the United States, provides: "The taking of photographs in the court room during the progress of judicial proceedings . . . shall not be permitted by the court." This rule is binding upon all federal courts. We can find no reason or basis for declaring such rules unconstitutional, and are unwilling to sanction the taking of pictures within the court room. Nor can we find that the extension of the prohibition to a limited area outside the court room is an abuse of the court's discretion.

Parte Savin, 131 U.S. 280. As stated in Ex Parte Sturm, 136 A. 312 (Md): "It is essential to the integrity and independence of judicial tribunals that they should have the power to enforce their own judgment as to what conduct is incompatible with the proper and orderly course of their procedure." The Westmoreland County rule is proper so long as it bears a reasonable relation to the aim sought: maintenance of the dignity of the court and the orderly administration of justice. Certainly in this case the area affected is reasonable, as are the limitations of action, and the rule prohibiting the taking of pictures within the stated limits is well within the power of the court. See also Robinson v. City Court for City of Ogden, 185 P. 2d 256 (Utah); People v. Ulrich, 34 N.E. 2d 393 (Ill.)

Amicus Curiae cites the case of People v. Jelke, 308 N.Y. 56, 123 N.E. 2d 769, in which conviction was reversed where the public and representatives of the press were excluded from the court room during the taking of testimony. But the court stated that the reason for the reversal in that case was that such exclusion deprived the defendant of an impartial and *public* trial. That case has no bearing on the instant case. Here the defendants were freely entitled to enter the court room and its precincts, and the press was accorded full coverage. Moreover, in an opinion written by the same judge who wrote the opinion in the cited case, the New York Court of Appeals denied the right of the Press Associations and Newspaper Publishers to be present at the trial of Jelke, and to report the proceedings, and further the court held: ". . . this is not a case of . . . freedom of the press . . . and . . . the right asserted by petitioners is not embraced within the con-

stitutional provision guaranteeing those freedoms . . . But freedom of the press is in no way abridged by an exclusionary ruling which denies newspapermen the opportunity to 'see and hear what transpired.' . . . The fact that petitioners are in the business of disseminating news gives them no special right or privilege, not possessed by other members of the public. . . ."[5] See also State of Ohio v. Clifford, 162 Ohio 370, 123 N.E. 2d 8, certiorari denied, 349 U.S. 929.

The defendants also violated the rules of court of Westmoreland County, which were made to insure the right of privacy of the defendant. There can be no question that American jurisprudence recognizes the right of privacy; the only question being its limits. See "The Right of Privacy," by Samuel D. Warren and Louis D. Brandeis, 4 Harvard Law Review, 193. As stated in 77 C.J.S., Right of Privacy, at page 397, in some, but not in all jurisdictions the existence of such right has been recognized, even in the absence of statutory regulation. In this jurisdiction we find no basis for denying the existence of such right or its enforceability. See the excellent opinion of Judge Alessandroni in Clayman v. Bernstein, 38 D. & C. 543, and cf. Harlow v. Buno Co., Inc., 36 D. & C. 101. See also Waring v. WDAS Broadcasting Station, Inc., 327 Pa. 433, 194 A. 631, and particularly the concurring opinion of Justice Maxey appearing at page 456; and Restatement of the Law of Torts, §867.

The court below, as are all courts, was charged with a duty to protect the right of privacy of the pris-

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[5] United Press Associations v. Valente (Judge), 308 N.Y. 71, 123 N.E. 2d 777.

oner. It cannot be doubted that the prisoner was powerless to do so by any means within his control; and in such case the court has an inherent duty to use all reasonable means to safeguard that right. It is true that, in a sense, the prisoner has been set apart from the general public and has become a "public figure." Yet he is the involuntary subject of court restraint and entitled to the safeguard of his individual right of privacy, just as the court is charged with securing to him his right of a fair trial and other rights too numerous to mention. In this case the defendant was found guilty of murder in the first degree by verdict of the jury, but at the same time he was a ward of the court who must be protected against the invasion of his rights by the press as well as the public. All reasonable rules looking to the establishment of such safeguards must be sustained. It needs no citation of cases to prove that many innocent persons have been found guilty and sentenced upon criminal charges, and later released when their freedom from guilt has been established. See Commonwealth v. Sampogna, 81 Pa. Superior Ct. 74, and Commonwealth v. Fedeli, 81 Pa. Superior Ct. 79.

The able opinion of President Judge Richard D. Laird, writing for the court below, amply justifies the sustaining of these judgments. However, since these are "test" cases, we prefer to modify the sentences by striking therefrom the provision for imprisonment, leaving the sentence intact as to the imposition of fine and costs.

With the determination that the rules, so far as involved here, are reasonable, and not an abuse of the

court's discretion, the judgment and sentences, as so modified, are affirmed.

Mr. Justice Bell filed an opinion concurring in part and dissenting in part.

Mr. Justice Musmanno filed a dissenting opinion.

Opinion Concurring in Part and Dissenting in Part

BELL, J. Filed: October 5, 1956

While I agree with the Court's decision prohibiting photographing a prisoner at the entrance of the Courtroom, I wish to record my emphatic opposition to photographing (with or without infra red rays) or televising or broadcasting Court proceedings. This question may not have been specifically argued in this case, but it was argued by the Press in an unreported companion case. Moreover, as Justice ARNOLD so aptly says, if the present contention of defendants is sustained the Court would have no power to forbid the taking of pictures in the Courtroom.

Freedom of the press—the right to freely publish and fearlessly criticize—was a plant of slow growth. It did not spring full-grown as Minerva did from the brow of Jupiter, nor rise as quickly as did the warriors when Cadmus sowed the dragon's teeth. It was planted by many hardy, freedom-loving souls and nurtured by public opinion for several centuries before it grew to be a tree of gigantic stature. Government both in England and the United States constantly tried to suppress or destroy it. Freedom of the press became a recognized inherent Right only after and as a result of the famous

Zenger libel case in New York City in 1735. In that case Zenger's lawyer, Andrew Hamilton of Philadelphia,* argued vigorously for the right of a newspaper to criticize freely and truthfully the acts and conduct of governmental officials. The Court refused to recognize the theory of freedom of the press, or permit Hamilton to prove "Truth" as a defense; nevertheless the jury, ignoring the charge of the Court, acquitted Zenger. Public opinion rallied to the cause which Hamilton pleaded and freedom of the press gradually became recognized as an inalienable Right which was ordained and affirmed in the Constitution of the United States and in the Constitution of Pennsylvania.

However, it is an often overlooked truism that neither freedom of speech nor freedom of the press, nor freedom of religion, which together constitute our Country's great bulwark of freedom, is absolute and unlimited:

Poulos v. New Hampshire, 345 U.S. 395; *Beauharnais v. Illinois,* 343 U.S. 250; *Garner v. Los Angeles Board,* 341 U.S. 716; *Dennis v. United States,* 341 U.S. 94; *American Communications Assn. v. Douds,* 339 U.S. 382; *Kovacs v. Cooper,* 336 U.S. 77; *United Public Workers of America v. Mitchell,* 330 U.S. 75; *Whitney v. California,* 274 U.S. 357; *Gitlow v. New York,* 268 U.S. 652; *Gilbert v. Minnesota,* 254 U.S. 325; *Schenck v. United*

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* The origin of the phrase "Smart as a Philadelphia lawyer", denoting the top of the legal profession, is attributed to Andrew Hamilton's brilliant defense of Zenger. See "Ordeal of the Press" by Ralph C. Busser, Esquire, published by the University of Pennsylvania in The General Magazine, Winter 1954.

States, 249 U.S. 47; *Frohwerk v. United States,* 249 U.S. 204; *Debs v. United States,* 249 U.S. 211; *Abrams v. United States,* 250 U.S. 616; *Pierce v. United States,* 252 U.S. 239; *Schaefer v. United States,* 251 U.S. 466; *Fitzgerald v. Philadelphia,* 376 Pa. 379, 102 A. 2d 887; *Wortex Mills, Inc. v. Textile Workers Union,* 369 Pa. 359, 363, 85 A. 2d 851; *Commonwealth v. Geuss,* 168 Pa. Superior Ct. 22, 76 A. 2d 500, 368 Pa. 290, 81 A. 2d 553; *State of Ohio v. Clifford,* 123 N.E. 2d 8. See also: Rule 223 (b), Pennsylvania Rules of Civil Procedure; Canon 35, Canons of Judicial Ethics, American Bar Association.

In *United Public Workers of America v. Mitchell,* 330 U.S. supra, the Court said (page 95): "Of course it is accepted constitutional doctrine that these fundamental human rights are not absolutes. . . . The essential rights of the First Amendment in some instances are subject to the elemental need for order without which the guarantees of civil rights to others would be a mockery."

In *American Communications Assn. v. Douds,* 339 U.S., supra, the Court said (page 394): "Although the First Amendment provides that Congress shall make no law abridging the freedom of speech, press or assembly, it has long been established that those freedoms themselves are dependent upon the power of constitutional government to survive. . . . Freedom of speech thus does not comprehend the right to speak on any subject at any time. . . . the right of the public to be protected from evils of conduct, even though First Amendment rights of persons or groups are thereby in some manner infringed, has received frequent and consistent recognition by this Court. [Citing cases.] . . .

We have never held that such freedoms are absolute. The reason is plain. As Mr. Chief Justice Hughes put it, 'Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses.' Cox v. New Hampshire, supra [312 U.S. 569] at 574."

In *Gitlow v. New York,* 268 U.S., supra, the Court said (page 666): "It is a fundamental principle, long established, that the freedom of speech and of the press which is secured by the Constitution, does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language and prevents the punishment of those who abuse this freedom. 2 Story on the Constitution, 5th ed., Sec. 1580, p. 634. Robertson v. Baldwin, 165 U.S. 275, 281; Patterson v. Colorado, 205 U.S. 454, 462; Fox v. Washington, 236 U.S. 273, 276; Schenck v. United States, 249 U.S. 47, 52; Frohwerk v. United States, 249 U.S. 204, 206; Debs v. United States, 249 U.S. 211, 213; Schaefer v. United States, 251 U.S. 466, 474; Gilbert v. Minnesota, 254 U.S. 325, 332; Warren v. United States, (C.C.A.) 183 Fed. 718, 721. Reasonably limited, it was said by Story in the passage cited, this freedom is an inestimable privilege in a free government; without such limitation, it might become the scourge of the republic."

In *Wortex Mills, Inc. v. Textile Workers Union,* 369 Pa., supra, this Court said (page 363): "Freedom of speech is not absolute or unlimited—for example, a man may not slander or libel another; he may not publicly blaspheme the Deity; he may not engage in loud speaking

through sound trucks during certain hours or in certain parts of the city; and he may not assemble with others to commit a breach of the peace or to incite to riot or to advocate the commission of crimes. Freedom of speech gives no right of intimidation or coercion and no right to damage or injure another's business or property, . . ."

To hold that Freedom of Speech or of the Press is absolute and unlimited would produce ridiculous situations and often result in disorder, confusion or Judicial or governmental paralysis. For example, under the *absolute* freedom theory, persons could talk lewdly or loudly or all at once, or even shout "Fire" in a Courtroom; every press representative and every freedom-loving citizen in the Courtroom could, during the trial, take noiseless photographs of Judge, jury, defendant and all persons connected with or witnessing the trial. Having one's picture taken, especially if it is likely to appear in the papers, possesses a fatal fascination for many persons. Under such theory and practice, the attention of the Judge, stenographer and witnesses would be diverted and distracted, every trial which had aroused a large public interest would degenerate into a circus side show, respect of the people for Law, Order and the Courts would diminish immensely, and many trials would become a travesty of Justice.

Furthermore, while gathering of the news is an indispensable part of the privately owned newspaper business, it is important to point out that freedom of the press does not give a constitutionally protected right to gather news: *United Press Associations v. Valente* (Court of Appeals of New York), 123 N.E. 2d 777, 778.

Sober reflection will refute any contrary view. For example, the Constitution does not require persons interviewed by the press to submit to interrogation or to answer questions or furnish data or information. Freedom of the press means a constitutionally protected right to publish news without censorship, but even that right is, as we have seen, neither absolute nor unlimited.

Appellants have not only overlooked the authorities hereinabove cited and quoted, but have likewise overlooked a very important analogous authority which cuts out from under them the ground upon which they build their basic contention of absolute Freedom of the Press. The Supreme Court of the United States has promulgated the following Rule of Court, viz., Rule 53 of the Federal Rules of Criminal Procedure, Title 18, U.S.C.A.: "The taking of photographs in the courtroom during the progress of judicial proceedings or radio broadcasting of judicial proceedings from the courtroom shall not be permitted by the court."

If the taking of photographs of Court proceedings was privileged by the First Amendment—"Congress shall make no law . . . abridging the freedom of speech or of the press . . ."—it is unthinkable that the Supreme Court of the United States would have adopted or would maintain its above quoted Rule of Court.

In the light of these reasons and authorities, it is manifest that a Court has the power, *and in the interest and for the preservation of Justice and the orderly administration of law,* should prohibit (1) the taking of photographs (as well as the broadcasting and televising) of Court proceedings, and (2) the photographing of all persons connected therewith, in Courtrooms and, if

necessary or advisable, within a reasonable distance from the entrances thereto. What is a reasonable distance will, in each case, depend upon the facts. However, the Court's power does not extend to other rooms or offices which are in the same building and are occupied by public or non-judicial officials, even though the entire building is called a Court House.

To summarize: It is clear that Rule of Court No. 6084 (a) and (b) adopted by the Courts of Westmoreland County, is valid and constitutional.

However, I do not agree with the majority's opinion on the subject of privacy, nor its prohibiting the taking of pictures of a prisoner who, while in custody, is on his way to or from the Court but not near the Courtroom. It seems to me that a person's right of privacy is limited and in some instances lost when he is charged with or convicted of crime. In such a case he becomes a public figure who, with certain limitations, as for example when he is in the Courtroom or in the County jail, is subject to being photographed in a public place, on a proper occasion and for a proper purpose. I believe that in such a case, the public interest is (subject as aforesaid) paramount to the private right or interest. Pictures have become a colorful and important part of a newspaper. Taking photographs of a public figure, like gathering public news, while not within the protection of the First Amendment, is an important right which should not be unreasonably shackled or restrained. Cf. *Craig v. Harney*, 331 U.S. 367; *Pennekamp v. Florida*, 328 U.S. 331; *Bridges v. California*, 314 U.S. 252. See also, Concurring Opinion of Justice FRANKFURTER in *Dennis v. United States*, 341 U.S. 529-553.

The language of the Supreme Court of Massachusetts in Themo v. New Eng. Newspaper Co., 306 Mass. 54, 58, is particularly applicable to the case of the appellant who was convicted of taking a picture of Wable on the *first* floor of the Courthouse:

> "The present cases do not require us to decide whether any right of privacy is recognized by the law of this Commonwealth. If any exists, it does not protect one from having his name or his likeness appear in the newspaper when there is a legitimate public interest in his existence, his experiences, his words, or his acts."

I would hold (1) that that part of Rule 6084 (d) which prohibits the photographing of a prisoner or inmate of the County Jail on his way to or from a session of the Court, but not at the entrance to the Courtroom (in this case three floors away), is invalid; and (2) the conviction of one of these appellants thereunder should be reversed.

Dissenting Opinion

MUSMANNO, J. Filed: October 5, 1956.

I.

The seven defendants in this case were found guilty of contempt of court in Westmoreland County because of the alleged violation of a Rule of Court (No. 6084) which prohibited, inter alia, the photographing of any prisoner on his way to or from a session of court, or of any person in any room of the courthouse without the knowledge and consent of the person photographed, or the taking of photographs in any place within 40 feet of the entrance to any courtroom. The seven defendants are William Block, publisher of the Pittsburgh Post-Gazette; Andrew Bernhard, editor of the Pittsburgh Post-Gazette; David W. Mack, publisher of the Greensburg Daily Tribune and Morning Review; Vince Johnson, staff writer of the Pittsburgh Post-Gazette; Robert Purdy, free-lance Pittsburgh cameraman, and Don Bindyke and James G. Klingensmith, Pittsburgh Post-Gazette photographers.

On December 28, 1954, the defendants participated in a photographic operation which resulted in the taking of several pictures of John Wesley Wable, convicted murderer, while he was on his way to and from a courtroom in the Westmoreland County courthouse. It was the belief of William Block, Andrew Bernhard, and David W. Mack, as publishers and editors of responsible newspapers, that they owed a duty to the public to supply pictures of Wable who, because of his menace to public safety, had become a figure of general interest and concern. They also believed that the Westmoreland County Rule of Court No. 6084 violated the Freedom of Speech

guaranty in the Constitution and that, therefore, they were acting within the framework of the organic law of the land when they directed their cameramen to photograph Wable. They did not, however, personally participate in any way in the actual photographic episode.

Every scrupulous effort was exerted by Messrs. Block, Bernhard, and Mack, together with the photographers themselves (and in this they were signally successful) to have the desired photography accomplished in a manner which in no way disturbed the tranquility, the orderly procedure, and the dignity of the Court. In fact, no cameras were introduced into the courtroom at any time, nor were pictures taken anywhere in the courthouse while the Court was in session. Furthermore, the cameras employed to take the few pictures involved were so small and were operated so unobtrusively, silently, and inconspicuously that no one, with the exception of the photographers themselves, were even aware that pictures had been taken.

Despite the solicitous and painstaking care with which the cameras were handled so as not to stir the slightest ripple in the atmospheric calm of the courthouse, the Westmoreland County Court adjudicated the defendants guilty of direct criminal contempt and sentenced William Block, Andrew Bernhard, and David W. Mack to pay the costs of prosecution, plus a fine of $500 each, and to be committed to the county jail for a period of 5 days. Reporter Vince Johnson and photographers Robert Purdy, Don Bindyke, and James G. Klingensmith were sentenced to pay costs of prosecution, a fine of $100 each, and to be committed to the county jail for a period of 5 days.

Dissenting Opinion.

The defendants appealed to this Court, and the majority of this Court has now affirmed the conviction. In doing so, it has struck a stinging blow against Freedom of the Press. Article I, Section 7 of the Pennsylvania Constitution provides:

> "The printing press shall be free to every person who may undertake to examine the proceedings of the Legislature *or any branch of government,* and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinion is one of the invaluable rights of man, and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty . . ."*

The courts, of course, are a branch of government. Article I, Section 11 of the Pennsylvania Constitution declares: "All courts shall be open." This means that the courts shall be open not only to the public but also to those who represent the public. Obviously the entire population of Westmoreland County can never enter the courthouse on any given day to witness a certain trial, but the Aladdin's Lamp of the newspaper provides the phenomenon of vicarious attendance, and the magic carpet of a photograph takes the reader to and into a courthouse as easily as it transports him across the sea.

The Majority Opinion, quoting Ervin D. Cahnam, Editor of the Christian Science Monitor, says that "Freedom of the press is not a right of the press. It is a right of the people." Despite the eminence of the journal quoted, the statement is the opinion of but one individual and, besides, it is an opinion which, while seeming to proclaim a great truth, succeeds only in executing an

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* Italics throughout, mine.

exercise in verbal gymnastics. It must be obvious to any high school student that when the press contends for its freedom, it necessarily battles for the right of the people to have a free press. When a lawyer lifts his voice in behalf of the constitutional rights of his client he is not pleading for his own personal prerogatives: he is presenting the claims of the person for whom he speaks. When a newspaper, through its representative, seeks admittance to legislative halls and courtrooms it asserts that right in the interests of the people. Thus, to say that freedom of the press is not the right of the press but of the people, is as trite as saying that the right of a senator to speak in the senate is not his own right but the right of the people who have elected him and whom he represents. Freedom of the press is the right of the people to be informed through the press and other media of communication.

That we should have to argue at this high hour in the day of civilization in behalf of the rights of the press to speak and act unrestrictedly in obtaining and reporting news is astonishing. After all the decisions which have been rendered, the books which have been written, the crusades which have been waged, the sermons which have been preached, and the lectures which have been delivered on freedom of the press; after witnessing every day, almost every hour, that freedom of the press is a living, breathing thing, constantly blossoming on the tree of tangible demonstration, it seems like defending the North Star to descant at length on the need of a free press in a free democracy. And yet, it appears that from time to time the most obvious truism is attacked and the most commonplace virtue is derided, and, as a consequence, one finds oneself defending the integrity of the

multiplication table, the sanctity of mother's love, and the need of milk for growing children.

Who can or should question that a free press is the very foundation of Anglo-Saxon democratic institutions?

> "It is recognized in England, Canada and in America, in fact in every English speaking government, that the press is one of the potent factors in the establishment and maintenance of free governments known to an enlightened civilization. The framers of the Constitution of the United States and of our State Constitutions, were not unmindful of this fact when they wrote into these instruments provisions guaranteeing freedom of speech and of the press. A free government has never tolerated the muzzling of the press or the stifling of free speech. At most, it has only held those who enjoy its freedom answerable for an abuse thereof." (Barton v. City of Bessmer, 173 So. 626, 628; 234 Ala. 20, rev's'g 173 So. 621, 27 Ala. App. 413.)

The reason Americans are the best informed people in the world is that they enjoy the benefits of an untrammeled press. And the reason we have the best government in the world is that, by receiving all the news, the American people can, with intelligence based on knowledge, determine for themselves what policy will best serve them in the retention of their freedoms and in the further progression of their destiny toward an improved welfare and broader horizons of opportunity.

Following World War II the whole world wanted to know and indeed had the right to know about the men charged with precipitating the global conflict which killed 20,000,000 human beings and so unbalanced the

equilibrium of the earth that it still teeters on the brink of annihilation. Civilization wished to see the faces of those who could have engineered so frightful a catastrophe. The Allied powers and the judges of the International War Crimes Tribunal agreed that photography was in order and arrangements were accordingly made in the Palace of Justice at Nuremberg for the placing of cameras in the courtroom so that persons and proceedings could be photographed without interrupting in the slightest the orderly procedure of the historical trials about to unfold. The pictures which came from those cameras will assist mankind in devising means to prevent repetition of the acts of monstrous and unprecedented brutality revealed at the Nuremberg trials.

Were there a free press throughout the world today, one-third of its population would not be groaning under the yoke of bolshevistic despotism. The history of the tyrannical usurpation of the rights of the people in country after country during the last twenty-five years is the history of the shackling and muzzling of the press. If Hitler, Mussolini, and Stalin had not strangled the free newspapers in their respective realms, their subjects could never have been goose-stepped, straightjacketed, and whipped into concentration camps, war, destruction, and despair.

There is not a civilized society where a free press is not as necessary as free schools. Moreover, newspapers serve the human race to a degree beyond the mere supplying of news. If there were no newspapers, a decent and orderly people would demand their creation. Newspapers are daily reminders that in life, eternal vigilance is the passport to safety, health, and happiness. With

the story of every crime, accident, and untoward happening goes the unspoken preachment that the reader could himself have been the fateful and unfortunate recipient of the punishment, the injury, or sorrow related, if he had succumbed to the same temptation, or had been equally careless, or had allowed himself to be drawn into a web of pernicious circumstance similar to the one depicted in the columns which now engross his attention. But if a newspaper is curtailed in its freedom and is not allowed to present all the facts,—by means of pictures or language—the reader to that extent is deprived of the opportunity to be forewarned of the evil, as well as fortuitous, forces bent on wreaking havoc and destruction.

The Majority takes an extraordinary view of freedom of the press when it says: "Whether or not freedom of the press is here involved is immaterial, since such freedom is subject to reasonable rules seeking maintenance of the court's dignity and the orderly administration of justice." When one speaks of freedom of any kind, one naturally intends freedom within reasonable rules because what goes beyond the boundary of reasonableness is no longer freedom but aggression. Freedom of the press is not restricted to the operation of linotype machines and printing presses. A rotary press needs raw material like a flour mill needs wheat. A print shop without material to print would be as meaningless as a vineyard without grapes, an orchard without trees, or a lawn without verdure.

Freedom of the press means freedom to gather news, write it, publish it, and circulate it. When any one of these integral operations is interdicted, freedom of the

press becomes a river without water. Gathering of news embraces photographing of the news, printing of the photographs, and reproduction of the photographs in the finished newspaper. To prohibit the taking of photographs is no less an infringement of freedom of the press than to prohibit the presence of a news reporter.

The action photo has become as much a part of the newspaper of today as the weather reports. To deny the newspaper reader pictures on the personalities and events of the day is to tear away one-half of his paper. Pictures have become wedded to the written word in the dissemination of information in every field of human endeavor.

If pictures may be taken (and they may) with such care and caution in church that no one feels that the sacredness of the holy edifice has been violated, why should they be prohibited in a courthouse? It is a fallacious notion that courtroom pictures create disrespect for the law. The contrary is true. Pictures of court proceedings which are being properly and dignifiedly conducted can only increase confidence in the processes of the law. To place a blinder over the lens of every press camera in the courthouse is to partially blindfold the people who have the right to know all of what is happening in the temple of justice.

II.

The Majority Opinion in this case advances the rather peculiar argument that: "The taking of a picture of a person called for sentence does not inform the public as to any material facts, and serves no purpose except to pander to the lower taste of some individuals."

The object of printing is to inform, and when one is informed on any stated subject he is to that degree better equipped to face any particular adversary in the battle for survival which never knows armistice. The public had the right to know about John Wesley Wable —for he was no ordinary person. He had become the consternation of the Pennsylvania Turnpike. While truck drivers lay asleep in the cabs of their vehicles, which were parked off the highway, refreshing themselves for the long and arduous journey still ahead, this uncommon human creature stole up on them and poured revolver fire into their heads in order to despoil them of their money and personal belongings. In the execution of this macabre banditry he killed two helpless and hapless motorists and seriously wounded a third. The public, not knowing the identity of this brutal assassin, referred to him as the "phantom killer." For many of the motorists on the turnpike, terror rode the bumpers of their cars. No one knew where the phantom, who had eluded all dragnets spread by the police, would strike next. A fog and mist of mortal apprehension hovered over Pennsylvania's famous thoroughfare. The newspapers carried front page stories on the "phantom killings", headlining and illustrating those stories with type and pictures appropriate to the momentousness of the sensational and tragic events.

Finally, on October 12, 1953, telegraph wires flashed bulletins from Albuquerque, New Mexico, that a John Wesley Wable, who was captured after a 30-mile automobile chase following the commission of a robbery, had on his person a pawn ticket for a watch taken from one of the victims of the turnpike killings. It was

also ascertained that the calibre of his pistol matched the calibre of a bullet taken from the body of one of the victims in Pennsylvania. Because of this incriminating evidence, plus statements made by the prisoner, he was charged with murder and taken to Westmoreland County, Pennsylvania, to be tried for the murder of Harry F. Pitts, who had been killed within the geographical confines of Westmoreland County.

Public interest in these sensational happenings crescendoed with the arrival of Wable in Pennsylvania, and the general public looked forward eagerly to the trial of the accused, which they expected to attend through the intervention of their newspapers which would report with story and picture the intense courtroom drama about to ensue. On March 1, 1954, the trial began. Some one hundred persons, who had consciously or unconsciously become members of the cast which had enacted the story of the turnpike killings and the later capture of the killer, were on hand, ready to testify. Practically all these persons were newsworthy. Among them were the defendant, his family, the family of the deceased truck driver, counsel for the prosecution and counsel for the defense, the jury, the trial judge, the girl in whose home Wable had lived at the time of the commission of the offense and her father, both of whom had given information which led to the defendant's ultimate apprehension, the pawn broker with whom the watch of one of the victims was pawned, the police officer who checked the records pertaining to the pawned watch, the deputy sheriff and other officers from New Mexico who participated in the chase and arrest of Wable, the Pennsylvania State Police, the ballistic ex-

perts, tire mark experts, and the photographer who had made pictures of the trucks and of tire marks involved in the fatal shootings. Many of these persons had been mentioned in the newspapers and it was only natural that the public wished to know what they looked like and how they would demean themselves as the curtain rose on the stage of the trial. The public, however, was to be disappointed. The Court of Westmoreland County promulgated a rule of court forbidding the taking of pictures of any person connected with the case.

But the interest in Wable, as the central figure in the drama, was not one of "lower tastes," as characterized by the Majority. General human behavior was involved in this extraordinary and important happening. Did Wable represent a particular type of human being? Should motorists be on guard against such persons who looked like Wable? What *did* Wable look like? Vince Johnson, reporter for the Pittsburgh Post-Gazette and one of the defendants, testified:

> "The reason it [the Wable case] was covered so extensively is the case had aroused national interest; on top of that, the issue as to whether or not the correct man had been apprehended was certainly important to the motorists who used the Pennsylvania Turnpike, who would have a very personal interest in the safety of the Turnpike. It is for that reason that extensive coverage was given; it is for that reason we continued to cover the sentencing of Wable."

In affirming the decision of the Westmoreland County Court, the Majority of this Court does not offer one substantial reason as to why Wable should not

have been photographed. What was to be gained in shielding this convicted murderer from photographers? Hiding him from the cameras almost implied concealment from the public of some mysterious fact. Why this secrecy? Secrecy, where events of public importance are involved, always suggests suppression, and suppression, in its own turn, generates rumors, and rumors, which are planted in the soil of suspicion eventually send forth the ugly plant of perverted truth.

Addressing itself to this very subject, the Supreme Court of Ohio has said:

> "The people have the right to know what is being done in their courts, and free observation and the utmost freedom of discussion of the proceedings of public tribunals that is consistent with truth and decency tends to the public welfare." (State v. Hensley, 75 Ohio St. 255.)

Only recently the highest Court in the State of New York (December, 1954, People v. Jelke, 308 N.Y. 56), held that excluding the press and the public from a criminal trial constitutes a judicial nullification of the defendant's right to a public trial, and accordingly ordered a new trial. The Majority Opinion mentions this monumental decision only to dismiss it by referring to another case, but the principles enunciated in the case of People v. Jelke cannot be dismissed summarily. The Court of Appeals of New York State said:

> "A variety of purposes has been ascribed to the principle of publicity in judicial proceedings. Foremost is that of affording greater security to the individual in the administration of justice. In contrast to secret inquisitional techniques, which are alien to a

free society, publicity serves as a safeguard against unjust persecution of an accused and goes far toward insuring him the fair trial to which he is entitled. . . . 'The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power.' . . . Due regard for defendant's rights to a public trial demanded, at the very least—certainly, lacking valid legislative sanction—that *he be not deprived of the possible benefits of attendance by the press.*"

More extraordinary than some other observations made by the Majority in its Opinion in this case is the one which sardonically announces:

"Court rooms and court houses are not places of entertainment, and trials are not had for the purpose of satisfying any sadistic instinct of the public seeking sensationalism."

If this type of reasoning is to prevail, why not then shut out the public from all courthouses? Why not also bar to the people the doors of the halls of the Legislature and the halls of Congress, for there may always exist the possibility that the drama of the courtroom and the excitement of legislative halls might cause "some individuals" to regard the courts and Congress as "places of entertainment"? This censure on the part of the Majority is in the nature of an indictment of the whole American public because interest in famous and important trials is as intense as the desire to follow the fortunes of baseball, football, and basket ball teams. It is part of the enthusiastic knowledgeableness of the American way of life.

The argument of the Majority against public participation in the viewing of court proceedings is the same argument which in ancient days sought to defend star chamber proceedings, sanctioned secret inquisitions, and authorized the torture and the rack, which always operated beyond the eye of the public. Yes, indeed, why not turn back the clock of civilization and give unappealable power to judges? Let no records be kept, photographic or otherwise. By that process the public will never have an opportunity to satisfy their instincts—not for sensationalism, but for information as to what their supposed servants are doing.

To assume, as the Majority Opinion does in this connection, that the courtroom is a private prize fight presided over by a robed referee whose actions and decisions must not be subjected to public scrutiny is to lose sight of the inclination of human nature to usurp autocratic powers where public criticism is not left free to curb it. There is nothing in history to reassure the citizen who is concerned for the freedoms of his country that decisions affecting the welfare and destiny of his fellow-citizens, which are arrived at and rendered secretly, will be free of tyrannical tendencies and egotistical absolutism.

The Supreme Court of the United States originated the formidable utterance already quoted, that:

> "The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power." (Re Oliver, 333 U.S. 257)

On this subject the Supreme Court of Arizona also spoke with wisdom:

". . . Protection from oppression or arbitrariness of the courts, its officers, and the prosecuting officer, will be assured so long as trained and discriminating newspaper reporters are present at the trial, keeping close and critical watch of everything done and said, for the purpose of publication in the daily press. A larger public is made acquainted with the salient facts of the trial, even while it is progressing, through the press than it is possible to reach through the open doors of the courtroom." (Keddington v. State, 19 Ariz. 457)

III.

In affirmation of the lower Court's decision, the Majority cites Canon 35 of the American Bar Association which reads:

"Proceedings in Court shall be conducted with fitting dignity and decorum. The taking of photographs in the Court room, during sessions of the Court or recess between sessions, and the broadcasting of Court proceedings are calculated to detract from the essential dignity of the proceedings, degrade the Court and create misconceptions with respect thereto in the mind of the public, and should not be permitted."

This Canon, adopted in 1937, was occasioned by the resentment properly felt by all men of the law over the circus-like atmosphere which reigned at the Bruno Hauptman trial in New Jersey. One looking in on that trial had to be edified with the spectacle of photographers leaping about like acrobats, while flash bulbs ex-

ploded, klegg lights glared, witnesses tripped over electric wires and broadcasting equipment, and spectators periodically demonstrated. But this deplorable spectacle which startled the American Bar Association into enacting Canon 35 was not typical of the Courts of the United States. The melancholy breakdown of judicial control in the Hauptman trial was strictly an exceptional one and should not be held up as a general evil to be combatted. What happened at the Hauptman trial could not and would not be tolerated today in any Court worthy of the name. In addition, the photography of 1956 is to the photography of 1935 what the modern automobile is to the Ford T-model car of 1915. Tripods, flash powder, box cameras, and enveloping hoods are archaic. Small pocket cameras can now capture images so skillfully, unobtrusively, and inaudibly that the subjects and surrounding persons are unaware that a lens has been aimed and a photographic lever has clicked.

The Majority Opinion states that Colorado has a Rule of Court similar to the one of Westmoreland County. It may be that at one time Colorado had such a rule, but if it ever existed it has dissolved in the tide of modern reappraisement of courtroom photography. In January of this year, Justice Moore of the Colorado Supreme Court, acting on behalf of the entire Court, conducted hearings and experiments on the subject of Canon 35 of the American Bar Association. On February 27, 1956, the Supreme Court of Colorado unanimously adopted Justice Moore's report, part of which declared:

> "We are concerned with realities and not with conjecture. Canon 35 assumes the fact to be that use of camera, radio and television instruments must

in every case interfere with the administration of justice in the particulars above mentioned . . . For six days I listened to evidence and witnessed demonstrations which proved conclusively that the assumption of facts as stated in the canon is wholly without support in reality. At least one hundred photographs were taken at various stages of the hearing which were printed and introduced as exhibits. All of them were taken without the least disturbance or interference with the proceedings, and, with one or two exceptions, without any knowledge on my part that a photograph was being taken . . .

Only the regular lighting at all times functioning in the court room was used, and any court room with adequate sunlight for ordinary court proceedings would require no additional lighting . . . The dignity or decorum of the court was not in the least disturbed."

(In Re Hearings Concerning Canon 35, 296 Pacific Reporter, 465, 468.)

As a result of these extending hearings and demonstrations, the Supreme Court of Colorado lifted the absolute ban against courtroom photography and authorized the judges in the State to determine for themselves in their own individual courtrooms, to what extent they would allow photography as well as radio and television broadcasting:

"The broad discretion thus given the trial court affords ample protection against abuses of the constitutional right of freedom of the press, and will lead to a cooperative effort as between the judiciary

and the press to protect, preserve, and portray the judicial process upon the level of justice to which it actually attains." (In re Hearings Canon 35, supra, p. 472.)

Canon 35 is not the formidable piece of artillery it once was. Its presence does not instinctively command fear, it does not engender awe. Indeed, upon examination it is found to be something less than a martial expression of incontrovertible truth and unassailable logic. In fact it somewhat exaggerates its calibre of factuality. For instance, it is something more than unadorned realism to say that the taking of photographs in a courtroom detracts "from the essential dignity of the proceedings." And certainly it is rhetorical magnification to say that photography could "degrade the Court and create misconceptions with respect thereto."* This is being recognized more and more by the bench and bar of today. Recently the American Bar Association's public relations chairman reported that a special committee is studying the canon and implied it would recommend a sharp modification.** United States Attorney General Herbert Brownell, Jr., has suggested the desirability of "another look" at Canon 35. In Cleveland, Ohio, thirteen judges of the Cuyahoga County bench recommended to the American Bar Association that it reexamine the Canon. In the early part of this year, and while the present case was pending in this Court, Judge A. Vincent Carroll of the Court of

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* This is connected up with "broadcasting of Court proceedings" which, unless done under the strictest supervision, could be disconcerting.

** Pittsburgh Press September 4, 1956.

Common Pleas of Philadelphia County allowed pictures to be taken during an important trial in his courtroom. Commenting on the experiment he said: "The photographers didn't interfere with the conduct of the trial as much as coughing in the spectator section of the courtroom did." Even today reports come in from Warren County that Judge Alexander Flick presiding there is allowing courtroom pictures of a robbery trial in his Court. The United States Court of Appeals and the Federal District Court for the District of Columbia have relaxed their rules for the taking of photographs in the courthouses, allowing, with the consent of the judges, photographing of any event other than a trial or hearing in which a judge of a court is presiding.

I have devoted this much time and space to discussing Canon 35 only because the Majority has wheeled it into action in attempted support of its decision. In point of reality, however, even if Canon 35 had legal effect in Pennsylvania, which it has not, it could not touch the defendants. This Canon trains its fire on cameramen in courtrooms but the defendants in this case did not cross the threshhold of the Westmoreland County courtroom devoted to the Wable sentencing on December 28, 1954. The defendant-photographers used their invisible cameras in the corridors of the first and fourth floors of the courthouse. The pictures on the fourth floor (floor of the courtroom) were taken prior to the convening of the Court and before the presiding judge had mounted the bench. The slight photographing on the first floor occurred after the Court had risen and was separated from the courtroom floor by three layers of steel beams, concrete, cement, heavy beams, stone, and marble. Only a person possessed of a rather vivid imagination could

conclude that the functioning of an invisible, inaudible camera could penetrate through this three-floor superincumbent barrier to disturb the dignity of a Court that was not convened—and not sitting in a courtroom that was empty and deserted.

The Majority Opinion goes on to say, however, that if this Court allows photographers to take pictures outside the courtroom it will be powerless to prevent them from invading the courtroom. One must read the Majority's language twice in order to be assured that a Court could utter so paralogistic a statement, but here it is:

> "But it must be conceded that if we sustain their contention that this rule of court infringes upon their rights of freedom of the press, [to take pictures outside the courtroom], the court likewise would have no power to forbid the taking of pictures in the courtroom which were accompanied by no disorder or disturbance."

This statement of the Majority might not dangle so helplessly and futilely in mid-air if the Majority would go further and explain *why* the Court cannot forbid the taking of pictures inside a courtroom, even though it would declare itself powerless to forbid the taking of pictures beyond the courtroom or outside the courthouse or in the public square.

The Pennsylvania General Assembly, which, of course, is the only sovereign body which can speak for the people of the State, has spoken on the subject of contempt of court. Section 23 of the Act of July 16, 1836, P.L. 784, 17 P.S. 2041, limits the power of the courts to inflict summary punishments for contempt to:

"III. Misbehavior of any person in the presence of the court, thereby obstructing the administration of justice."

How can there be an "obstructing the administration of justice" when the act complained of cannot be seen, heard, or felt? The Sheriff of Westmoreland County, Howard Bud Thomas, accompanied the prisoner Wable for the specific purpose of preventing his being photographed. At the end of the journey he thought he had accomplished his purpose! What more effective testimony could there be that the photographing of the defendant was done without misbehavior?

The Majority, quoting from Ex Parte Savin, 131 U.S. 280, says:

". . . the Court, at least *when in session,* is present in every part of the place set apart for its own use, and for the use of its officers, jurors and witnesses; and *misbehavior* anywhere in such place is misbehavior in the presence of the court."

But where was there any session of the Court? And where was there any misbehavior? Braden Leasure, deputy sheriff who was at Wable's side when the inaudible cameras clicked, testified:

"Q. When you got off the bridge, and came onto the corridor on the first floor, did you notice any people around there?

A. There were people on the first floor, sure.

Q. You didn't notice anybody that had cameras who were taking pictures?

A. I didn't see any cameras, no, sir.

Q. Did you notice any unusual commotion or disturbance of any sort?

A. Oh, no, I didn't see any disturbance.
Q. When you brought the prisoner into the court room from the rotunda, the long corridor on the fourth floor, did you notice any commotion of any kind there?
A. No.
Q. When you brought him downstairs, down the stairs to the first floor, did you notice any unusual commotion there?
A. There was a lot of people gathered around the rotunda to watch him going down; they wanted to see the prisoner, that's natural.
Q. No disturbance of any kind?
A. I didn't see any."

Thus we see that there was no disturbance, no commotion, no visible cameras. And certainly not a whisper of misbehavior. Where was there the obstruction of the administration of justice?

The Majority Opinion seems to proceed on the theory that the citation of many authorities, even though entirely irrelevant, because not applicable to the facts in this case, will supply legal substantiation to its conclusions. Thus, it quotes from the Federal Rules of Criminal Procedure promulgated by the Supreme Court of the United States:

> "The taking of photographs in the courtroom during the progress of judicial proceedings . . . shall not be permitted by the court."

How often has it been demonstrated, and admitted by the Majority, that the photographs in this case were not taken in a courtroom and not taken during the progress of judicial proceedings?

The Majority Opinion, again accentuating the irrelevant and emphasizing the extraneous, says:

> "This Court has adopted Rule 233 of the Pennsylvania Rules of Civil Procedure, which has the effect of a statute, and which provides: 'During the *trial of actions* the court shall prohibit the taking of photographs and motion pictures in the courtroom and the transmission of communications by telegraph, telephone, or radio in or from the court room."

But in the case at bar, no photographs were taken "during the trial of actions," and there was "no transmission of communications by telegraph, telephone, or radio in or from the court room."

IV.

The Majority says further that Wable was "entitled to the safeguard of his individual right of privacy," and that the lower Court owed him a duty to protect him from "invasion of his rights" by the press as well as the public "since he was a ward of the court." But Wable was a defendant in a murder prosecution, and to speak of privacy at any public trial is to speak of privacy in a show window.

The most striking and indeed most vital feature of a criminal trial in America is the very fact that it is public. If, on the basis of a defendant's right of privacy, he is not to be photographed, reporters then should be prohibited from describing him in written language, because a skilled and experienced writer can often draw a word picture which can be as revealing as a photo-

graph. Thus, press artists should also be prohibited from drawing pen-and-ink sketches of an accused.

Rights of privacy, like so many rights, are relative. Everyone who lives in an orderly community is called upon to relinquish certain inherent prerogatives in exchange for the great benefits which would not be his in a primitive or hermitic state. Protection against robbers, fires, floods, violence are the returns the citizen enjoys from his investment in Human Society, Incorporated. Nor do I believe that party litigants and witnesses expect the isolation and privacy of their homes when they enter a courthouse. They may dislike being photographed as they may dislike being cross-examined, but they know that in this instance their business is the public's business and the public has the right to know what is transpiring. One cannot stand at the crossroads of the world and expect the solitude of a cloistered cell. The United States Circuit Court of Appeals, Third Circuit, speaking on this subject, declared that one's "interest in being left alone" is "overbalanced by the general public interest in being kept informed." (Leverton v. Curtis Pub. Co., 192 Fed. Reporter 2nd, 974, 976.)

Where one becomes the subject of legitimate public interest, the printing of his name or picture does not constitute an actional invasion of the right of privacy. In the case of Berg v. Minneapolis Star and Tribune Company, 79 Fed, Supp. 957, the plaintiff sued the owner of a newspaper, contending that the newspaper had invaded his rights of privacy by printing a picture of him taken during a hearing in divorce proceedings which he had instituted against his wife. The United States Dis-

trict Court (Minnesota) held that his complaint lacked merit:

> "The plaintiff does not contend that the article accompanying the photograph in any way presents an inaccurate or distorted picture of the proceedings. Nor is it contended that the picture depicts him in any other light than the normal or natural pose. In other words, if the news item constitutes legitimate news the picture seems entirely appropriate to the news. It [sic] the court, therefore, is correct in holding that the news published by the defendant regarding the custody proceedings constitutes a legitimate news item, and it would seem that no other view can be entertained under the admitted situation, it must follow that the publishing of Berg's picture in the manner indicated did not violate any right of privacy which the law may afford . . . The note writer in 138 L.R.A. who covers in an extended article the subject of the right of privacy, states on page 78 that 'it is settled that the publication of a person's name or picture in connection with the news or historical event of legitimate public interest does not constitute an actionable invasion of the right of privacy'."

When an individual, willingly or unwillingly, becomes part of a public event, his rights of privacy decrease in proportion to the rights of the public to know what has transpired. This is not in derogation of his constitutional privileges, but in defense of the welfare of the public, of which he is an integral part. The person who is unfortunately injured in a railroad accident may not legally complain because the camera photo-

graphing the event includes him in the sweep of its lens. The man who has the misfortune to be robbed becomes an unwilling part of an event which has entered into the public realm. His right not to be photographed must bow to the superior right of the public to be protected; and part of that protection could well lie in photography which can help in the search for and the apprehension of the robber. The man who himself has been implicated in crime cannot object to being photographed any more than he can object to being questioned by the police and finger-printed, and, if indicted, to being tried, even though it should develop eventually he is innocent. A fortiori, one who has actually been tried and convicted of crime becomes part of the public business of the State and he has no right to withhold from the public his picture any more than he can withhold from the public the story of his crime.

Suppose that while a defendant is being taken to or from a courtroom, a mob should try to seize him, does this Court intend to hold that under those circumstances no pictures could be taken? Suppose, while the prisoner is in transit through the courthouse, a fire should break out or a stairway collapse, would cameramen be required first to obtain signatures of all persons in the scene before they could take a picture which would inform the public and the authorities of the threatened or happened calamity?

In the case of Jones v. Harold Post Co., 230 Ky. 227, the Supreme Court of Kentucky said:

> "There are times, however, when one, whether willingly or not, becomes an actor in an occurrence of public or general interest. When this takes place,

he emerges from his seclusion, and it is not an invasion of his right of privacy to publish his photograph with an account of such occurrence."

The Supreme Court of Colorado in the citation already referred to (In Re Hearings Concerning Canon 35, 296 P. 2d 465), speaks of rights of privacy under Canon 35 as follows:

"To uphold Canon 35 on the ground that it prevents a violation of the individual's 'right of privacy' would be to repudiate the provision of our constitution by rule of court, and to make effective the prior restraint upon freedom to publish, although the constitution expressly prohibits such restraints by clearly indicating that the remedy for abuse of the constitutional right to publish 'whatever he will on any subject' is that the publisher shall be 'responsible for all abuse of that liberty.' How can it be contended that the prior restraint upon conduct imposed by the canon is valid when the constitution clearly indicates that the remedy for abuse of the 'right of privacy' must be compensatory in character?" (P. 470).

In the case of Themo v. New Eng. Newspaper Co., 306 Mass. 54, 58, the Supreme Court of Massachusetts said:

"The present cases do not require us to decide whether any right of privacy is recognized by the law of this Commonwealth. If any exists, it does not protect one from having his name or his likeness appear in the newspaper when there is a legitimate public interest in his existence, his experiences, his words, or his acts."

Perhaps the most startling proposition in the Majority's Opinion in the case at bar, is the inference that Wable's right of privacy had to be protected because it was within the realm of possibility that Wable might later be found innocent, for, the Majority points out, "it needs no citation of cases to prove that many innocent persons have been found guilty and sentenced upon criminal charges, and later released when their freedom of guilt has been established." This solicitude on the part of the Majority seems to me to be a wholly unnecessary precaution. All the protection in the world against the publication of Wable's picture will be of little avail to him. He can never be released from prison.

Wable is dead.

Wable was executed and his bones have been buried deep in the ground he stained with the blood of the victims he killed. I cannot refrain from uttering at this juncture the observation that it must come as a surprise to the public, if not a shock, to learn that after rendering the decision which authorized Wable's electrocution, the Majority now suggests the possibility that Wable might conceivably have been innocent. Since I participated in the decision which affirmed Wable's conviction of murder in the first degree, I hasten to state without equivocation that not the thinnest shadow of a doubt crosses my mind that Wable was guilty of premeditated murder and that, so long as capital punishment remains part of the law of the land, he richly deserved what he received.

There can be no justice in any certain decision unless there is a meeting of the minds on the facts. The decision of the Majority in this case is a stranger to justice because it is based on a premise which has no factual

existence. The Majority asserts that the rule of the Court below was instituted for the "dignity of the court and the decorum of trial." But the defendants here did not disturb the dignity of the court, nor did they disconcert the decorum of a trial. There was no trial on the day the photographers appeared, and, as already stated, the defendants did not once enter the courtroom. Thus, the Majority is arguing for a dignity which was never ruffled and spiritedly defending a decorum which was never jostled. As heretofore declared, the judges did not know that pictures were being taken. In fact, as repeatedly asserted in this Opinion, no one, with the exception of the photographers themselves, were aware that cameras had been operated.

V.

Up to this point I have discussed the merits of this case insofar as substantive rights are concerned, but there is even a more momentous reason for declaring the Court's decision here a monumental error. That reason points to a gaping niche which should never be left unfilled in a Court's decision, namely, fairness. A tribunal's judgment which overlooks the elements of square dealing can never achieve the respect which should be an inseparable adjunct of any adjudication in the law. The defendants in this case are being stigmatized and punished for an Act which this Court invited and authorized.

On February 25, 1954, the Courts of Common Pleas, Quarter Sessions, Oyer and Terminer and General Jail Delivery of Westmoreland County promulgated an order which in effect prohibited photographers from approaching or entering the courthouse or jail of Westmoreland

County. The strict application of the order meant that the public in Westmoreland County would be denied pictorial news heretofore embraced within the purview of newspaper service.

The Tribune Review Publishing Company and the Pittsburgh Post-Gazette decided to test the workability of the order and accordingly sent photographers to the Greensburg courthouse to take pictures of principals and witnesses in the Wable trial. The Sheriff of Westmoreland County halted the photographers and ordered them to deposit their cameras in his office. He also warned them that any attempt on their part to defy the photographic ban would result in dire consequences to them. Confronted with this legal stone wall in the only State court to which they could apply for relief the Tribune Review Publishing Company turned to the Federal courts, averring denial of due process of law. Acting under the provisions of the Act of Congress of June 25, 1948, (28 U.S.C.A. 1343) this Greensburg publishing firm, later joined by the Pittsburgh Post-Gazette as intervening plaintiff, petitioned the United States District Court of Western Pennsylvania for a restraining order to prevent the Sheriff of Westmoreland County from enforcing the restrictions of the order in question. A temporary restraining order issued the same day. The Sheriff then made a motion that the Court dissolve the restraining order, and, on this issue joined, the District Court went into an extensive hearing on the matter. Numerous witnesses were heard, and nearly 300 pages of testimony were taken on every phase of the controversy.

On March 12, 1954, the United States Court, speaking through Chief Judge Gourley, ordered, directed and

decreed that "proceedings in this court be stayed pending a determination of proceedings to be brought with reasonable promptness in the Supreme Court of Pennsylvania to have adjudicated the legality of the order or regulation issued by the Courts of Westmoreland County."

With reasonable promptness the Tribune Review Publishing Company, with its publisher David W. Mack, applied to this Court for a writ of prohibition against the judges of the Courts of Westmoreland County on the ground that their rule of court contravened the rights of the petitioners under Article I, Section 7 of the Pennsylvania Constitution, and under the 1st and 14th Amendments to the Constitution of the United States, being an abridgment of the rights of the petitioners to freedom of speech and of the press. The judges of the Courts of Westmoreland County filed an Answer to the Petition for the writ of prohibition and both sides then prepared, published, and presented to this Court extensive briefs on the question at issue. The Pennsylvania Newspapers Publishers Association intervened as an additional party plaintiff and filed a brief. The National Press Photographers Association, acting as amicus curiae, filed a brief. The case was presented to this Court in an oral argument which lasted four or five hours.

On June 29, 1954, the petition for a writ of prohibition was dismissed, not because of any lack of merit in the petitioners' argument in behalf of freedom of the press but because, this Court said, no justiciable question was involved in the lawsuit. However, the dismissal was not conclusive; it did not close the books on the controversy; it did not seal the Court's judgment. It in fact invited the petitioners to try again. The Opinion an-

nounced: "Such dismissal is made without prejudice as to the merits of the question presently raised or any future consideration thereof if presented in a proper case."

In order to reassure the petitioners that this Court stood ready to re-hear the matter, the Court emphasized at the end of the Opinion: "The petition is dismissed without prejudice." But even before these written reassurances to the effect that the final question remained undecided, oral overtures had been made, during the argument, by one or two members of the bench that if the petitioners or others in their behalf challenged the lower Court's rule directly, and this challenge was followed by prosecution, this Court would then welcome the determination of the undecided question. The present Opinion writer stated from the bench at the time that he did not approve of such a procedure because it implied that the Law itself was invoking a violation of its own precepts. Furthermore, he saw no necessity for another lawsuit. All the ingredients for a definitive adjudication were at hand.

Even the Court which had formulated the Rule conceded that the elements for a final decision on the Rule were present when the case was before us in June, 1954. In their brief, speaking through their attorneys, the majority of the Court of Common Pleas, Court of Quarter Sessions and Court of Oyer and Terminer of Westmoreland County said at the time:

"The Sheriff of Westmoreland County was instructed by the Court to enforce and prevent the violation of the said Rule of Court. On the first day of March, 1954, . . . David W. Mack, one of the petitioners in

this case, after causing the Sheriff to be notified of his intention, acquired the services of a photographer, Castle J. Pyle, and accompanied him to the Westmoreland County court house for the purpose of testing the validity of the said Rule of Court and the right of the Sheriff to enforce the same. The said David W. Mack and Castle J. Pyle were advised by the Sheriff that should they attempt to take photographs in the court house during any session of court or the recesses between sessions of court *they would be apprehended and taken before the court for appropriate action.*"

What more was required? Was Pyle's camera to be smashed and his body cast into prison before the action would be ripe for adjudication? When the Sheriff warned Pyle that if he attempted to take a picture, he would be punished, there came into being a fait accompli which required this Court, upon suitable petition, to decide whether a writ of prohibition should or should not issue against the Court charged with violating constitutional rights.

The Majority of this Court said in June, 1954, that a new case should originate in Westmoreland County so that this Court might have the benefit of the views of the Court which had authored the controverted Rule of Court. But to ask for the views of the lower Court in this matter was like seeking owls in Athens. That Court had already spoken decisively and unequivocally, both in words and deeds. It is my earnest belief that the Westmoreland County Court would not have imposed the sentences entered in this case were it not that it felt compelled to do so by this Court's decision in June, 1954.

The Westmoreland Court had promulgated its Rule of Court; it had warned the petitioners that if they violated it, they would be punished. But, by its decision, this Court in effect said that one thing more was required: a penalty had to be imposed before it could take jurisdiction.

Certainly nothing else was needed in the way of information or argument. The Court below had supplied a 39-page brief. We had the benefit of 300 pages of testimony taken in the United States Court as well as the exhaustive 41-page Opinion of Chief Judge Gourley in that Court. It is inconceivable that anything more could have been added by the parties by way of testimony or citation of authorities. Nevertheless this Court ruled that the petitioners should return to the starting place and travel again the path which would lead to the place where they now were.

The petitioners followed the Court's recommendation. David W. Mack got himself arrested. In an abundance of acquiescence with this Court's desires, six others of the Fourth Estate also submitted themselves to arrest, satisfied that the test would enlighten the newspaper profession on what its rights were in a situation of this kind. Instead, however, of being legalized experimentees in a court-authenticated test, the volunteers found themselves convicted of criminal contempt and sentenced to five days' imprisonment plus the payment of fines and costs. When the smoke cleared away they appealed to this Court with the undoubted assurance that since they had only done what had been suggested by this Court, the convictions would be reversed

and the world informed on the legality and constitutionality of Rule No. 6084.

On January 13, 1956, the whole affair came before this Court again. The many-times-told tale was told once again. The same arguments which had been previously made by the attorneys were again expounded at length, and the same situations which had been previously examined were once more explored. But this time the Court was willing to render a decision, and today that decision has been announced. It has affirmed the conviction. It, however, has modified the sentence. It tempered the wind to the shorn lamb by extracting from the gale of punishment the teeth of imprisonment. In explanation of this grace, the Majority of the Court says that "these are 'test' cases." But if these cases are test cases for the purpose of saving the defendants from prison, they have to be test cases for the purpose of relieving them, not only from the payment of fines and costs, but from the judgment of guilt which, in the republic of honor and reputation, can be as hurtful to the spirit as a few days' imprisonment can be to the body. A test cannot be a half test. It either is a whole test or it is not a test at all. It cannot be half test and half defiance. It cannot be half-amicable and half-bellicose.

The Court's modification of the sentence is damning with faint leniency. The defendants are entitled to an outright acquittal. Anything less than that is, in my estimation, a reflection on this tribunal. The defendants are not criminals nor have they done anything suggestive of contempt for court or law. They are men of excellent name and reputation, they committed no offense—legal, moral, or civic. They performed an act of public

service. They sought light where there was darkness, they asked for clarification where there was ambiguity, they petitioned for a determination of their constitutional rights. They worked with the law, not against the law.

At the time the pictures were taken, William Block, publisher of the Pittsburgh Post-Gazette said:

> "Certainly no one wishes to interfere with the orderly procedures of the courtroom or in any way detract from the dignity of the court."

David W. Mack, publisher of the Greensburg Tribune-Review Publishing Company, said: "The picture taking was not done thoughtlessly but thoughtfully." The other defendants acted with dignity and decorum in the accomplishment of their designated mission. They caused no disturbance, they offended no person, they displayed no attitude suggestive of contempt or disdain for the Court.

At the hearing in Westmoreland County on April 12, 1955, no verdict of criminal contempt would have been possible on the presentation of the prosecution's case alone. None of the Commonwealth witnesses testified that the defendants had taken pictures. It was the candor of the defendants themselves which made possible the reconstruction of the whole event, the narrative of which so clearly revealed that the culminating episode was the result of this Court's urging of a test case. For this Court now to declare the defendants guilty of criminal contempt, when they acted on the recommendation of the Court, is to write a judgment on a parchment of insensibilty bearing the seal not of justice but of injustice.

VI.

To let this verdict of guilty stand is to avow entrapment. No agency of government may constitutionally induce a law-abiding citizen to perform an act which the government intends to prosecute as an illegal act. The Supreme Court of the United States has said that—

> "it is unconscionable, contrary to public policy, and to the established law of the land to punish a man for the commission of an offense of the like of which he had never been guilty, either in thought or in deed, and evidently never would have been guilty of if the officers of the law had not inspired, incited, persuaded, and lured him to attempt to commit it." (Sorrells v. United States, 287 U.S. 435, 444.)

The highest court in the land said further that "the Government cannot be permitted to contend that he [the accused] is guilty of a crime where the government officials are the instigators of his conduct."

That this Court did not consciously intend entrapment does not alter the clearly etched configuration of the picture of entrapment. The decision being rendered today by this Court could have been pronounced in June, 1954. The legal question which was eventually to be passed upon was as obvious as the morning sun from the very inception of the controversy. All that has followed since the summer of 1954 could have been avoided by this Court. When the Westmoreland County Court announced its Rule in February, 1954, the rights and the obligations of the defendants had taken concrete form. It was unnecessary for them to subject themselves to criminal proceedings in order to have those rights and obligations adjudicated. If the Westmoreland County Court had, by

Rule of Court, prohibited the general public from entering the courthouse, this Court could certainly have intervened to strike down so obviously unconstitutional a ban. The fact that the ban was something less than a wholesale prohibition does not lessen the power of this Court to determine the constitutionality of the rule actually made. This Court has the duty to pass upon any action of a lower Court which is charged with jeopardizing the constitutional rights of the people. We have so declared many times.

The Tribune Review Publishing Company, publishing newspapers at the county seat of Westmoreland County, had for years taken photographs in about the courthouse in Greensburg. Suddenly that right was voided. It was not asserted anywhere that public security, public health, or public morals dictated the photographic interdiction. Depriving the newspapers of photographic privileges materially affected the property rights of the owners. They were, on that score alone, entitled to due process of law in the determination of the question as to whether an illegal confiscation had taken place.

In refusing the writ of prohibition requested in June, 1954, this Court said that it "cannot undertake to revise or edit rules adopted by courts of inferior jurisdiction unless and until their application — not their threatened but their actual application — gives right to a grievance subject to appellate review and remedy." In order to get the "actual application," which this Court asked for, were the newspaper photographers required to undertake violence by brandishing their cameras in the face of the Sheriff of Westmoreland County who was

standing by with admonitory guards and threatening deputies? Did this Court need that kind of an upheaval as a basis for passing upon the constitutional rights of citizens of the United States?

This Court has never said before that it could not intervene where a lower Court was charged with abusing its power. In fact it had on numerous occasions declared just to the contrary. In the case of Carpenter Coal & Coke Co., 360 Pa. 94, we said:

> "The power of controlling the action of inferior courts is so general and comprehensive that it has never been limited by prescribed forms of procedure or by the particular nature of the writs employed for its exercise. It may further be pointed out that Article V, section 3 of the Constitution expressly permits the exercise by this Court of original jurisdiction in cases of mandamus to courts of inferior jurisdiction and prohibition is the exact counterpart of mandamus, the only difference being that the latter commands certain things to be done whereas prohibition forbids the doing of certain things which ought not to be done."

It has not been necessary in the past, where a lower Court threatened an illegal or unconstitutional act, that the citizen should subject himself to the threatened illegality before this Court could order a writ of prohibition to restrain the abuse of constitutional power. In Park's Petition, 329 Pa. 60, this Court, on the petition of the district attorney, issued a writ of prohibition to prevent the assignment of a County Court judge to hold court in the Court of Oyer and Terminer in Allegheny County. In the case of Communist Party Petition,

365 Pa. 549, this Court issued a Writ of Prohibition abating an order of the Court of Quarter Sessions of Allegheny County which had padlocked the premises of the Communist Party in Pittsburgh. In McNair's Petition, 324 Pa. 48, the petitioning mayor obtained an order from this Court prohibiting a grand jury investigation.

In the case of Carpenter Coal & Coke Co., 369 Pa., 954, supra, this Court explained that:

> "It [the writ of prohibition] does not seek relief from any alleged wrong threatened by an adverse party; indeed it is not a proceeding between private litigants at all but solely between two courts, a superior and an inferior, being the means by which the former exercises superintendence over the latter and keeps it within the limits of its rightful powers and jurisdiction."

Over and over this Court has made clear that if a lower Court exceeds its power, the Writ of Prohibition will be utilized to bring it back to its proper boundaries of jurisdiction:

> "There has always been the limitation on this power [of a Court to make rules for the transaction of its business] that rules of court must not be contrary to law or unreasonable . . . A court cannot by rule divest itself of a duty which is placed upon it by law. Nor can a rule divest a citizen of a legal right." (Equipment Corp. of America v. Primos V. Co., 285 Pa. 432, 435.)

If this Court had given heed to its own authoritative utterances, it would have declared in June, 1954, that the controverted Westmoreland County Rule of Court was constitutional or unconstitutional — and that would

have terminated the litigation. Instead, however, of deciding the issue squarely brought before it, the Court paved the way for further proceedings by declaring, as already stated:

> "Any action, whether in the nature of contempt proceedings or otherwise, which is brought to test the validity of the rule complained of, should be initiated in the court of its authorship."

This Court later acknowledged that it had authorized the test, when the Majority stated on May 25, 1955:

> "The order of this court in the Tribune case . . . held that there was nothing justiciable before us for decision, dismissed the petition without prejudice, and *suggested that a proper test case might be presented.*"*

It is unnecessary to add that the suggestion of the highest Court of the Commonwealth implies as much an obedience as did the invitation of the monarchs of old. And that this Court then accepted the present case as the test it "suggested" is conclusively established by its statement, also made on May 25, 1955:

> "A *test case has been instituted* and decided in the Court of Common Pleas of Westmoreland County, has been appealed to our court, and will be argued at the Fall Session of the court in Pittsburgh."*

That "test case" is the one before us now. The defendants faithfully followed this Court's instructions, they acted to "test the validity of the rule complained of," they initiated the proceeding in "the court of its authorship." And, as a consequence, they are being

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* Musmanno, Appellant, v. Eldredge, 382 Pa. 167, 169.

branded by this Court, of violation of law. This is the strangest procedure I have witnessed in all my many years at the law.

In a pleading filed in the Dauphin County Court of Common Pleas on December 8, 1954, (1 D. & C. 2nd 535), the following statement appears in connection with a proceeding related to the controversy over Westmoreland County Rule of Court No. 6084:

> "At the consultation on November 9, 1954, the Chief Justice related to the entire membership of the Court that he had made several efforts to have an amicable test case begun in Westmoreland County. He stated that he had spoken to counsel for the petitioners and he related that he also had had interviews with various judges of the Westmoreland County bench on the subject of amicable test action. It was stated further that one or more of the other Justices were present at the interview with the Westmoreland County judges."

This conference or conversation between members of this Court (the present writer was not present) and members of the Westmoreland County Court further demonstrates the "testing" nature of the whole proceeding.

The Majority Opinion fails to answer the question which must suggest itself to anyone who has followed the vicissitudes of this over two-year-old litigation, namely: Why has this Court affirmed a rule of court which, while definitely abridging the rights of the public, meets no need of the public? Where liberties are limited in any way, there must be an overriding purpose to be served. But where is the danger that is to be met, where

is the evil to be confronted, where is the threat to be faced?

The Rule of Court which this Court is affirming is an anomaly in Pennsylvania. In Allegheny County, where the court business exceeds that of Westmoreland's by many times, photography is permitted anywhere in the courthouse except in courtrooms actually in court session. Nor is there any restriction on the photographing of defendants moving to and from court. In Philadelphia, the largest county in the Commonwealth, pictures may be taken without restraint in the corridors of City Hall which houses most of the Philadelphia courts, as well as the Superior and Supreme Courts of Pennsylvania.

How can this Court approve a rule in one county which has no counterpart in the other counties? On what foundation of law, logic, or abstract justice may this Court build a judgment which pronounces the defendants in this case guilty of criminal contempt in Westmoreland County when others who performed the same acts in Philadelphia County suffer no legal penalty? What makes a wholesome test in Westmoreland County an illegality while a similar test in Philadelphia County is free of taint? Lawyers and lay citizens have the right to expect consistency in the law. Where is there the consistency in the present state of affairs? Where is there the harmony of decision which should symbolize the jurisprudence of a Commonwealth?

I submit that it is most unjust to punish these defendants for cooperating with the highest Court in the Commonwealth. As wise as are the defendants in the ways of life, being experienced newspaper men, it would

never have occurred to them that the Supreme Court would not stand by with life preservers to save them in the event that the ice, which they had been urged to test, might have broken under their weight.

From time immemorial judges have been proclaiming that ignorance of the law is no excuse for its violation, but this will be the first time in the history of our revered Commonwealth, where men can be punished for following the instruction of judges.

I dissent to the ultimate.

Opinion and Decree Dismissing Motions in Arrest of Judgment

BY THE COURT EN BANC:
(Opinion by LAIRD, P.J.)

A hearing on this attachment for contempt was held on April 12, 1955, by this Court sitting en banc. The defendants are David W. Mack, publisher of the Greensburg Daily Tribune and Morning Review, Robert Purdy, a free lance photographer, William Block, publisher of the Pittsburgh Post-Gazette, Andrew Bernhard, editor of the Pittsburgh Post-Gazette, Vince Johnson, reporter for the Pittsburgh Post-Gazette, and James G. Klingensmith and Don Bindyke, news photographers employed by the Pittsburgh Post-Gazette. At the conclusion of the hearing, the Court found all of the defendants guilty of direct criminal contempts and imposed sentences of fines and imprisonment upon the defendants.

The facts disclosed by the testimony are as follows: On December 28, 1954, John Wesley Wable, who had

been convicted of murder and who was confined in the Westmoreland County Jail, had been called for sentence before Edward G. Bauer, Judge of the Court of Quarter Sessions and Oyer and Terminer in Court Room Number Five on the fourth floor of the Court House. The prisoner was escorted from the jail to the court room by Howard Bud Thomas, Sheriff of Westmoreland County, and some of his deputies. He was brought from the County Jail through the Bridge of Sighs to the first floor of the Court House, and was taken by elevator to the fourth floor.

By pre-arrangement among all of the defendants, a plan was set in motion to take pictures of Wable. An unidentified man took a position at a point between the first floor and second floor of the Court House from which he signaled to the defendant, Vince Johnson, stationed on the fourth floor, that the prisoner was being taken from the first floor to the fourth floor by elevator. Johnson then signaled Don Bindyke, who was stationed at a point in the fourth floor corridor near the entrance to the court room.

A large number of people, including officers of the Court and spectators, had assembled in the fourth floor corridor adjacent to the court room. The Court Room was crowded, and a number of State Police, deputies and constables stood guard in the aisles and at the three doors of the Court Room. The Court House elevators are at the Southwest end of the fourth floor corridor, and Judge Bauer's Court Room is at the North end of of the corridor. As the prisoner was being escorted from the elevator to the Court Room, Bindyke, using a small concealed camera, took two pictures of Wable and

some of the Sheriff's deputies just before the prisoner entered the Court Room. These pictures were taken without seeking or obtaining permission from either Wable or the Sheriff's deputies.

Bindyke later took a third picture on the first floor of the Court House near the Bridge of Sighs. This picture was also taken without the permission of Wable or the deputies. Bindyke testified that he had been instructed to take pictures on the fourth floor, and that he had been instructed to conceal his camera and to avoid detection. He stated that he knew that there was a rule of Court prohibiting the taking of these pictures, and that he came to Greensburg with Vince Johnson under instructions from the city desk on an order put out by the editors of the Pittsburgh Post-Gazette.

The defendant, Robert Purdy, testified that he was a free lance photographer, that he was hired by the defendant, David W. Mack, that he knew about the rule of Court and came to the Court House in defiance of the rule for the purpose of taking pictures of Wable. Using a small camera, concealed under his coat, he took five or six exposures of Wable. These pictures were taken without asking or receiving permission from either Wable or the Sheriff's deputies, who also appeared in the pictures. Some of the pictures taken by Bindyke and Purdy were published in the Greensburg Tribune and Review and in the Pittsburgh Post-Gazette.

According to the testimony of the defendant, Vince Johnson, all of the defendants had arranged the plan of action, and each played a part in the plan. The defendant, William Block, publisher of the Pittsburgh Post-Gazette, and the defendant, Andrew Bernhard, editor

of the Pittsburgh Post-Gazette, in cooperation with the defendant, David W. Mack, publisher of the Greensburg Tribune and Review, instructed the photographers to take pictures of the prisoner, Wable, notwithstanding the fact that this Court had adopted a rule of Court prohibiting the taking of photographs at certain times and at certain places in the Court House. The defendant, James G. Klingensmith, was instructed to get a picture, if he could, and if he found that he was unable to get a picture, then he was to act as a decoy so that the other photographers might secure pictures. Vince Johnson was in charge of the actual operation of the plan and stationed the photographers in their respective positions in the Court House. The photographs were taken surreptitiously and without the knowledge of Judge Bauer, who was presiding at the time. They were taken in direct and intentional violation of Westmoreland County Rule of Court Number 6084 (formerly 205b).

Upon learning of the taking of the photographs, and the execution of the plan to violate the rule of Court, Judge Bauer conferred with his colleagues, and on January 4, 1955, the Court, comprised of President Judge Richard D. Laird and Judges Edward G. Bauer and John M. O'Connell, issued an Order for the attachment of all the defendants in contempt. Counsel for the defendants requested and were granted permission to produce the defendants before the Court at a later date to be agreed upon.

Following the hearing and the imposition of sentences, the Court, at the defendant's request, stayed the execuion of sentences pending the outcome of ap-

peals. Later the defendants filed motions in arrest of judgment.

The power of this Court to punish for contempt cannot be questioned. This power is not derived solely from legislative enactment, but is inherent. As stated by Mr. Chief Justice Horace Stern, speaking for the Supreme Court of Pennsylvania, in Levine Contempt Case, 372 Pa. 612, 618:

> "Generally speaking, one is guilty of contempt when his conduct tends to bring the authority and administration of the law into disrespect. The right to punish for such contempt is inherent in all courts. When it is committed in its presence the court may, in punishing the offender, act of its own knowledge without further process, proof, or examination. Such power, 'although arbitrary in its nature and liable to abuse, is absolutely essential to the protection of the courts in the discharge of their functions.' Ex Parte Terry, 128 U. S. 289, 313. It is a power 'essential to preserve their authority and to prevent the administration of justice from falling into disrepute.' Fisher v. Pace, 336 U. S. 153, 159. The Act of June 16, 1836, P. L. 784, section 23, 17 P. S. section 2041, recognizes 'The power of the several courts of this Commonwealth * * * to inflict summary punishments for contempts of court' in cases, inter alia, of 'the misbehavior of any person in the presence of the court, thereby obstructing the administration of justice.' "

The fact that the contempt in this case was committed in the corridor of the Court House rather than in the Court Room does not impair the power of the

Court to punish for contempt. Greason v. Cumberland Railway Company, 54 Pa. Superior Ct. 595, 600.

It is contended by counsel for defendants that the punishment which may be inflicted upon the defendants in this case is limited by the Act of June 16, 1836, P. L. 784 (17 P.S. 2041 et seq), section 24 of which reads as follows:

> "The punishment of imprisonment for contempt as aforesaid shall extend only to such contempts as shall be committed in open court, and all other contempts shall be punished by fine only."

The term "open court" ordinarily denotes a court in session organized for the transaction of judicial business. 29 Words and Phrases, 523. At the time of the commission of the contempts in this case, Court was in session, the Court Room was filled with people, and preparations had been made for the sentencing of John Wesley Wable. We are of the opinion that the fact that the contempts were committed outside the Court Room does not limit our right to impose a sentence of both fine and imprisonment upon the defendants. This is a constitutional court, created under the provisions of Article V, Section 1 of the Constitution of the Commonwealth of Pennsylvania. The inherent power of a constitutional Court to punish for contempts committed in the actual or constructive presence of the Court cannot be abridged by the legislature. Nor did the legislature intend so to encroach upon the province of the judiciary as to limit its power to imprison for contempt to such contempts as are committed within the perimeter of the Court Room.

The "Court" extends to all parts of the Court House in which an officer of the Court may be performing a function of the Court. The Sheriff and his deputies were officers of the Court, under the direct control and supervision of the Court, and performing functions of the Court at the time the contempts were committed in this case. The words "shall extend only to such contempts as shall be committed in open court" refer to such contempts as may be committed in the presence, actual or constructive, of a Court in session organized for the transaction of judicial business, as distinguished from such contempts as may be committed during an adjournment of the Court, or between sessions. To hold that this Court may punish by imprisonment a contempt committed on one side of the swinging door at the entrance to the Court Room, and that the same contempt committed on the other side of the swinging door is punishable only by a fine, would be an absurdity which the legislature did not intend.

Under the provisions of rule 205 of the Pennsylvania Rules of Civil Procedure, the canons of ethics of the American Bar Association are the standards of conduct of the Bar of this County. Canon 35 is as follows:

> "Proceedings in Court should be conducted with fitting dignity and decorum. The taking of photographs in the Court Room, during sessions of the Court or recess between sessions, and the broadcasting of Court proceedings are calculated to detract from the essential dignity of the proceedings, degrade the Court, and create misconceptions with respect thereto in the mind of the public, and should not be permitted."

Supreme Court rule 223 (b) provides as follows:

> "During the trial of actions the Court shall prohibit the taking of photographs and motion pictures in the Court Room and the transmission of communications by telegraph, telephone, or radio in or from the Court Room."

This Court adopted as Rule 205b, the following Rule of Court which was renumbered as Rule Number 6084 by the Rules Committee of the Westmoreland Law Association:

> "(a) No pictures or photographs shall be taken, immediately preceding or during sessions of this court or recesses between sessions, in any of the court rooms or at any place in the court house within forty feet of the entrance to any court room.
>
> (b) No court proceeding shall be broadcast or televised.
>
> (c) No pictures or photographs of any party to a civil or criminal action, juror or witness, shall be taken in the Law Library or in any office or other room of the court house, except with the knowledge and consent of the person or persons photographed.
>
> (d) No prisoner or inmate of the county jail shall be photographed in the jail or on his way to or from a session of court."

It is contended by counsel for defendants in this case that our rule 6084 is inconsistent with the Supreme Court rule, and, therefore, invalid. We see no merit in this contention. The Supreme Court rule, prohibiting the taking of photographs in the Court Room during the trial of actions, is merely a minimum requirement

or limitation established by the highest Court in the State for the regulation of all State Courts. It should not be construed to be a maximum limitation beyond which lower Courts may not go in the adoption of local rules. For example, Rule 223 (b) merely prohibits the taking of photographs, etc. "during the trial of actions." Surely even the defendants in this case would not contend that, by reason of the language in rule 223 (b), the Court has no right to go further and, by local rule, prohibit the taking of pictures in the Court Room after the trial of a criminal action has been completed and while a prisoner is being sentenced. Far from being inconsistent or incompatible with rule 223(b), Westmoreland County Rule 6084 incorporates the provisions of rule 223(b) and then proceeds to state such further restrictions and limitations as this Court deems proper and necessary for the preservation of the dignity of the Court and orderly administration of justice.

Counsel for defendants further contend that the legislature has, in effect, "pre-empted the field" by enacting the Act of May 2, 1929, P. L. 1278, which provides for a summary proceeding against any person causing any outcry or disorder, etc. or disturbing the peace in the County Court House, jail or other county buildings. They also contend that rule 6084 is an invasion of the powers of the legislature and inconsistent with the laws of the Commonwealth. Such reasoning would require us to hold that the said Act of 1929 repealed the Act of June 16, 1836, P. L. 784, section 21 (17 P.S. section 2076), which gives the Courts of Common Pleas of the Commonwealth power to establish Rules of Court, to regulate their own practice, the Act of March 31, 1860, P. L. 427 (17 P. S. section 361) which authorizes the Courts of

Quarter Sessions of the Commonwealth to establish rules for the regulation of their practice, and the Act of June 16, 1836, P. L. 784, section 23 (17 P. S. section 2041) which gives the several Courts of the Commonwealth the power to punish for contempt. We decline so to hold.

The defendants contend that the Rule of Court (6084) is unreasonable and is a denial of their Constitutional right of "freedom of the press" under the 14th Amendment of the Constitution of the United States. With these contentions we must disagree. The soundness of the Rule is attested by the fact that many Federal Courts have adopted rules with respect to the taking of photographs, etc. which are very similar to the Westmoreland County rule, and in some instances considerably more rigid. Among those Federal Courts which have adopted similar rules are Colorado (Rule 11), District of Columbia (Rule 95), Kansas (Rule 16), Minnesota (Rule 4), New Mexico (Rule 14), North Dakota (Rule 6), Oklahoma (Northern Eastern and Western Districts) and Wisconsin (Rule 41).

Is the Westmoreland County rule unreasonable only because of its effect on newspaper photographers? The rights of newspapers and their employees rise no higher than those of ordinary citizens. If news photographers were permitted to take photographs in the corridors of the Court House adjacent to the Court Rooms, or photographs of parties to civil and criminal proceedings, amateur photographers would have the same rights. It is conceivable that in certain instances bedlam might be created in the Court House during the trial of cases which had received wide publicity.

Counsel for the defendants contend that even the Supreme Court Rule and Canon 35 should be relegated to the limbo of things forgotten because of improvements in the mechanical processes of taking photographs. It is contended that pictures now may be taken in the Court Room without disturbing the decorum of the Court or the orderly administration of justice. We recognize the fact that some judges have no objection to Court Room publicity, including the taking of photographs or motion pictures of Court proceedings, and possibly even televising trials or arguments. Just as Courts have the inherent power to impose restrictions in order to preserve decorum in the Court Room and to maintain the orderly administration of justice, so those Courts which are not averse to newspaper publicity, photographic or otherwise, have the power to permit such publicity, except for such restraint as may be placed upon them by Canon 35. We do not presume to say what other Courts should do by way of allowing or restricting the use of photographic equipment.

We do hold, however, that, as stated by the Maryland Court of Appeals in Ex Parte Sturm et al., 51 A.L.R. 356, 361:

> "It is essential to the integrity and independence of judicial tribunals that they should have the power to enforce their own judgment as to what conduct is incompatible with the proper and orderly course of their procedure."

This Court has adopted a rule which it feels will be conducive to dignity and decorum and to the orderly administration of justice. This is what the parties to an action, either criminal or civil, are entitled to expect.

Court rooms and court houses are not places of entertainment, and trials are not conducted for the purpose of satisfying the sadistic instincts of those members of the public who seek sensationalism, or those newspapers which seek to provide it.

The fact that contempts in this case did not occur in the Court Room but in the corridors of the Court House, does not make the rule unreasonable. The Court stated, in the case of Ex Parte Savin, 131 U. S. 280, that:

> ". . . the Court, at least when in session, is present in every part of the place set apart for its own use, and for the use of its officers, jurors and witnesses; and misbehavior anywhere in such place is misbehavior in the presence of the Court."

The reason for, and the reasonableness of, the Westmoreland County Rule of Court may easily be demonstrated. In the very case before us, one of the defendants, James Klingensmith, who was acting as a decoy, took a camera from a shopping bag and indicated that he was about to take a photograph of the prisoner, John Wesley Wable. It was necessary for the Sheriff, who with his deputies were escorting the prisoner, to step quickly before Klingensmith in order to prevent him from taking a picture. Such an occurrence easily could have led to disorder which might have made possible the escape of the prisoner, who had been found guilty of murder. Short of this, such an incident easily could have produced such a disturbance in the corridors of the Court House as to lead to riot, especially if those whose photographs were about to be taken should decide to object by violent action. Neither the prisoner nor the deputies should be compelled to run the gauntlet of a battery of cameras, and our Rule is intended to prevent such an incident as occurred in this case.

The judgment of a newspaper publisher or editor as to what constitutes a reasonable exercise of the inherent power of the Court may not be substituted for that of the Court. As stated by the Court in Ex Parte Sturm, et al., supra, at page 362:

"The privileges of the press under the law deserve the appreciative consideration of the judiciary. There are occasions when the vindication of those privileges depends upon judicial action. The high importance of the press as an agency of modern civilization is nowhere more freely recognized than in courts of justice . . ."

"But the duty and disposition of a Court to accord a justly ample scope to the liberty of the press should not be carried to the point of an undue abridgement of the court's own freedom. There are proper spheres within which the courts and the press may operate without any conflict of interest or purpose. In this case the liberty of the press has been invoked in support of acts which were an invasion of the domain within which the authority of the courts is exclusive. A due regard for the integrity of the judicial power forbids, and the legitimate interests of the press do not require that such an encroachment should be sanctioned."

It is our opinion that freedom of the press is not involved in this case. The taking of pictures should not be confused with the right of freedom of expression, either orally or by publication, as contemplated by the Fourteenth Amendment to the United States Constitution. The taking of photographs is not an absolute right guaranteed by the Constitution of the United States,

but is a privilege which is subject to regulation, especially by Courts in the exercise of their inherent power to preserve the integrity of the Courts, and by appropriate regulation, to assure the expeditious administration of justice without disturbance of any kind. See the State of Ohio, Appellee, v. Clifford et al., Appellants, 123 N.E. 2d. 8.

No complaint has been made by the defendants in this case that they were denied the privilege of full reportorial coverage of either the trial or the sentencing of John Wesley Wable. Actually, the newspapers represented by these defendants were provided with a press table and were allowed special privileges at the trial of the case, and the members of this Court have personal knowledge of the fact that the trial was adequately reported in the press.

At the hearing in the contempt proceeding, it was admitted by the publisher of the Pittsburgh Post-Gazette that his newspaper had many pictures of Wable, but it is the contention of the newspapers that adequate coverage cannot be realized without pictures as close as possible to the time and place of the actual trial and sentencing. This we perceive to be a matter of mere convenience to the news photographers which in the opinion of their superiors will enable them to procure more newsworthy pictures and to sell more newspapers. The newspapers urge that their sole desire is to keep the public informed. Clearly the members of the public have a right to be informed that their Courts are enforcing the laws of the Commonwealth and the principles of justice. This information can be secured by reporters and published without restraint. It cannot, however, be

photographed. A picture showing the physical characteristics of a prisoner, the trial judge, the attorneys, the officers of the Court or the Court Room cannot portray the knowledge that a defendant in a criminal proceeding has received a fair trial, or that the litigants in a civil proceeding have been dealt with impartially.

The Westmoreland County Rule of Court prohibits neither the gathering of news nor the publication thereof. It is not, therefore, in derogation of any right, privilege or immunity secured to the defendants by the Constitution of the United States or of the Commonwealth.

Although we have concluded that the taking of pictures is not a constituent element of "freedom of the press", it might well be pointed out that even freedom of the press and freedom of speech are subject to reasonable rules and regulations. See Commonwealth v. Egan, 113 Pa. Superior Ct. 375; Duquesne City v. Fincke, 269 Pa. 112; Poulos v. New Hampshire, 345 U.S. 395, and Fitzgerald, Appellant, v. Philadelphia, 376 Pa. 379, 102 A 2d 887.

The argument has been advanced by the defendants that the right of privacy has not yet been judicially recognized in Pennsylvania, and that Wable and the Sheriff's deputies, being newsworthy, had no right of privacy. It appears to be true that the Supreme Court of Pennsylvania has not stated categorically that the right of privacy exists in Pennsylvania. There are, however, two lower Court cases (Harlow et ux. v. Buno Co., Inc., 36 D. & C. 101, and Clayman v. Bernstein, 38 D. & C. 543), in which Judge Allessandroni of Philadelphia County held that the right of privacy existed. A similar conclusion was reached by Judge Goodrich of

the United States Court of Appeals for the Third District in the case of Leverton v. Curtis Publishing Company, 192 Fed. 2d 974.

In Hazlitt v. Fawcett Publications, Inc., 116 Fed. Supp. 538, the United States District Court for the District of Connecticut affirmed the existence of the "right of privacy". The opinion in that case stated that the trend toward recognition of the right of privacy has been pronounced, and that since 1936 no Court in any state has denied the right.

It is the opinion of this Court that persons who are present in Court by virtue of judicial process, and not of their own volition, are entitled to the protection of the Court from invasion of their right of privacy by photographers. We realize that individuals sometimes waive the right of privacy, as, for example, by becoming part of a crowd at a sporting event in which photographs may be taken, or by entry into public life. This Court recognizes, however, the existence of a right of privacy as a right which is personal to each individual, and which cannot be waived by the Court. This Court, therefore, extends the shield of protection to those who are called upon to appear in Court by virtue of judicial process.

While the national spotlight is upon the subject of "freedom of the press", it might be well to cast the light of public attention upon another attribute of the press, which is seldom, if ever, referred to by the members of the so-called "fourth estate"—that is, the power of the press. Cases are "tried" in the newspapers long before they reach the court room. Public opinion frequently is molded to the extent that entire jury panels are exhausted before twelve persons can be chosen, who have

not already formed an opinion by reason of what they have read in the newspapers. Changes of venue sometimes are necessary because of the stirring of emotions by over-zealous newspaper reporters, who publish what they believe to be newsworthy without regard to the effect upon the litigants and their ability to secure a fair trial. Reporters assigned to cover the trial of cases frequently select what they regard to be the highlights of the testimony, but which actually appear, to the Court and the attorneys in the case, as incidents of small significance, which are likely to mislead rather than inform the public. Reporters and editors alike make statements, which are devoured by the members of the reading public, who believe the statements to be absolute verity, whereas, in point of fact, they are colored to suit the point of view reflected by the editorial policy of the particular newspaper. Misleading statements are made in the public print, sometimes unintentionally, which cannot be answered by those who are adversely affected by them, for the simple reason that there is no vehicle by which to reply unless the offended party is himself the owner of a newspaper.

Even the Courts are powerless to place before the public, in a manner comparable in effect to that which is available to their critics, a reply to attacks upon the integrity or impartiality of the Courts. The present controversy is an example of this. Much has appeared in the newspapers, both editorially and reportorially, to indicate to the public that this Court has been completely unfair in adopting its role prohibiting the taking of photographs at certain times and at certain places in the Court House. Manifestly, the justification for the rule, and the arguments in support of its validity,

have not been advanced to the general public. Such perverted use of the power of the press might well tend to bring the Courts into disrepute among those who accept without question what they read in the newspapers.

We do not propose that freedom of the press, as guaranteed by the United States Constitution, be curbed in any respect, but we insist that the power of the press must not be permitted to override the inherent right of Courts to adopt such regulations as will insure the impartial and expeditious administration of justice and preserve the dignity and decorum of the court.

Judge Philbrick McCoy, of the Superior Court of California, in an article in the April, 1954 Journal of the American Judicature Society cited the following editorial written by the editor of a Los Angeles newspaper:

"Newspapers that oppose official efforts to insure fair trial insist that they are fighting for freedom of the press and that they know what is in the interest of law and order."

"But there is no complete freedom for the press. Newspapers should respect the rights that the constitution and the laws grant to other people.

"Newspaper men are not laws unto themselves. Federal and state constitutions and laws provide rights for every citizen.

"Newspaper men should face the fact that they are extremely prejudiced when it comes to the question of whether or not the publication of a picture

or story which will contribute to the sale of newspapers, will deprive some citizen of his rights. . . .

"Newspapers should hold great respect for a public official who has the courage to stand up against demands of newspapers in order to protect the rights of some lowly citizen. Few public officials have such courage.

"Too many public officials grovel before powerful newspapers and violate their duties to their citizens. . . .

"When a judge insists that it is his duty to run his courtroom in the interests of fair trials and justice, regardless of whether or not it pleases newspaper men, that judge should be highly commended for his courage."

AND NOW, to wit: this 9th day of June, 1955, after hearing and after due and careful consideration, it is ordered, adjudged and decreed, all Judges concurring, that the several motions in arrest of judgment heretofore filed by the defendants be, and the same hereby are, dismissed.

RICHARD D. LAIRD
President Judge

Concurring:

EDWARD G. BAUER, Judge
JOHN M. O'CONNELL, Judge

Attest: ....., Clerk

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

THE TRIBUNE REVIEW PUBLISHING Co., a corporation, and DAVID W. MACK, Plaintiffs,
vs.
HOWARD BUD THOMAS, Defendant.

No. 12033 Civi Action

Complaint in Equity

1. The plaintiff, The Tribune Review Publishin Co., is a corporation organized and existing under th laws of Pennsylvania, and having its principal office o place of business in the City of Greensburg, Westmor land County, Pennsylvania.

2. The plaintiff, David W. Mack, is General Ma ager of the plaintiff, The Tribune Review Publishing Co and is a resident of the City of Greensburg, Westmor land County, Pennsylvania.

3. The plaintiffs are publishers of the Greensbu Morning Review and the Greensburg Daily Tribune, r spectively morning and afternoon newspapers of gener circulation in Westmoreland County, Pennsylvania, a elsewhere. Said papers are each published five days each week.

4. The defendant, Howard Bud Thomas, is the du elected and acting Sheriff of Westmoreland Count Pennsylvania.

5. This Court has jurisdiction of this proceedi under the Act of Congress of June 25, 1948, C. 646, Stat. 932, 28 USCA 1343, which provides that the Di

trict Court shall have original jurisdiction of any civil action authorized by law to be commenced by any person to redress the deprivation, under color of any state law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States.

6. The Court of Common Pleas, the Court of Quarter Sessions, and the Court of Oyer and Terminer of Westmoreland County, Pennsylvania, did, on the 25th day of February 1954, adopt a regulation or order of court forbidding any one to take any pictures inside of the court house during any session of the court or the recesses between the session, and forbidding any person, litigant, prosecutor, defendant, plaintiff, claimant or respondent, juror or witness to be photographed, or to have his or her or their picture taken in the court room, or in any of the halls or corridors or approaches thereto during any session of the court or recess between sessions, and forbidding the photographing of any prisoner or inmate of the county jail in the jail or in any of the approaches thereto, or on his way to or from a session of the court. A copy of said regulation or order of court is attached hereto, made a part hereof, and marked Exhibit "A".

7. The court house in Greensburg is a spacious structure, consisting of a basement and four floors. The basement is occupied entirely by public offices. The main or first floor entirely of public offices. The second floor is occupied by two court rooms, a public library, and consultation rooms and hearing rooms. Said court rooms on the second floor are separated by a spacious corridor. The third floor of said court house has one court room

and other public offices, as well as a large corridor. Th fourth floor of said court house has two court rooms, on of which is occupied by the Orphans' Court, and othe public offices and a spacious corridor.

8. At the present time, only one of the court room in said court house is actually in session, to wit, Cour Room No. 2 on the second floor on the north side of sai court house. The court house is so constructed tha photographs can be taken in the basement and first o main floor of the court house and in the corridors, con sultation rooms and hearing rooms on the second floo and third and fourth floors without any possible interfer ence with court proceedings.

9. The defendant, Howard Bud Thomas, on the firs day of March 1954, acting under color of said regula tion or order of court, stationed guards, in both uniforn and plain clothes, at strategic points in and about th corridors and stairways of the court house, and has an nounced his intention to enforce said regulation or orde of court, and has instructed and advised reporters an camera-men of the plaintiffs, and all other newspaper and news reporting agencies that if photographs ar taken in the court house they will be forthwith arreste and charged with contempt of court, and has requeste cameramen of the plaintiff, as well as camera-men o other newspapers and news reporting agencies, upo entering the courthouse, to deposit their cameras in th Sheriff's office before going elsewhere in the court hous

10. The plaintiff, David W. Mack, on the first da of March 1954, entered the first floor of the court hous in company with Castle Pyle, a news photographer, bot of whom were acting for and on behalf of the plaintif

The Tribune Review Publishing Co., and the newspapers published by it, for the purpose of taking photographs of news worthy individuals and objects in and about the court house, when they were stopped by the defendant, Howard Bud Thomas, and asked whether they knew of the court order or regulation, and when told they were familiar with the court regulation he instructed them not to take any pictures, and that if they did take pictures, they would be arrested and charged with contempt of court. The plaintiff, David W. Mack, and his news photographer were on the first floor of the court house at the time said admonition was given by the defendant, Howard Bud Thomas.

11. There is presently pending before the Court in Westmoreland County an important trial of vast public interest which has received nation-wide publicity, and the plaintiffs have been advised and believe that some seventy-five witnesses from various parts of the United States have been summoned as witnesses in said case, and are in attendance and will be in attendance at the trial, and in and about the court house, many of whom are willing to be photographed and many of whose photographs are proper subjects for publication in connection with news articles concerning said trial. In addition, there are various other participants in said trial, who are in and about the corridors and other points in said court house, whose pictures are proper subjects for publication in connection with news articles concerning said persons.

12. The plaintiffs aver that in the future there will be additional trials of great public interest in Westmoreland County of which the public will be entitled to be informed by photographs as well as by word description.

13. Said regulation or order of court, and the acts of the defendant, Howard Bud Thomas, under color of the same, contravenes the fourteenth amendment to the Constitution of the United States, and deprives the plaintiffs of their right to gather, publish and print news, including photographic reproductions of news worthy subjects, and amounts to a censorship of the press, and a denial of the right of free speech and of the right of a free press and a deprivation of plaintiffs' property and rights without due process of law, and constitutes a denial of the right of the public of Westmoreland County to be informed on matters of great public interest.

14. The plaintiffs do not claim the right to take newspaper photographs in the court room during the actual progress of any trial, or so near thereto as to constitute an interference with the judicial process, and do not claim the right to photograph the defendant for publication without his consent, or to in anywise prejudice the right of any party in any present or future proceeding by photographic reproductions or otherwise.

15. Immediate and irreparable injury, loss and damage is resulting, and will result to the plaintiffs by reason of the acts of the defendant, Howard Bud Thomas, in enforcing said regulation, and in depriving the plaintiffs of their rights and liberties under the due process clause of the Fourteenth Amendment of the Constitution of the United States before notice can be served and a hearing had on plaintiffs' motion for preliminary injunction in that the plaintiffs will be deprived of the opportunity of photographing witnesses and other persons present at the trial of the case of national importance now pending before said court, and

present in the lobbies, corridors, and other parts of said court house other than the court rooms and places immediately adjacent thereto, and that said persons will have returned to their respective places of residence throughout the United States before said matter can be disposed of after notice and hearing, and that other cases of public interest may be tried before said matter may be disposed of after notice and hearing, and that the public of Westmoreland County, and other portions of the State and nation will be deprived of its right to be fully informed on matters of public interest before this proceeding can be determined after notice and hearing.

WHEREFORE, the plaintiffs, The Tribune Review Publishing Co. and David W. Mack, need equitable relief, and pray:

(a) That the defendant, Howard Bud Thomas, his agents, deputies and others acting under him, be restrained and enjoined, under color of said regulation and order of court, from enforcing or attempting to enforce the same except insofar as said regulation or order of court relates to court rooms or places in such close proximity thereto as to interfere with the orderly proceedings of the court in the conduct of trials actually in progress, and excepting the right to photograph the defendant in custody of the court if he objects thereto.

(b) That the defendant, Howard Bud Thomas, his agents, deputies and others acting under him, be restrained and enjoined from in any manner interfering with the news camera men or others acting for the plaintiffs from photographing witnesses,

litigants, prosecutor, defendant, plaintiff, claimant or respondent, or other persons of news worthy interest in the proceeding presently on trial, or to be on trial until such time as the plaintiffs' motion for preliminary injunction can be heard on notice, and thereafter until the constitutionality of such regulation or order of court can be finally determined.

THE TRIBUNE REVIEW PUBLISHING CO. and
DAVID W. MACK,
By FRED B. TRESCHER
KUNKLE & TRESCHER
Attorneys

Commonwealth of Pennsylvania }
County of Westmoreland } ss.:

DAVID W. MACK, being duly sworn, deposes and says that he is Vice President of The Tribune Review Publishing Co., and as such duly authorized for and on its behalf to make this affidavit, and that he is the individual plaintiff named in the above captioned proceeding, and that the facts set forth in the foregoing complaint are true.

DAVID W. MACK

SWORN to and subscribed before me this 1st day of March, 1954.

ANN MANIX
Notary Public

My commission expires March 10, 1955.

EXHIBIT "A"

"No one shall take any pictures inside of the courthouse during any session of the court, or the recesses between sessions, and no person, litigant, prosecutor, defendant, plaintiff, claimant or respondent, juror, or witness shall be photographed or have his or her or their pictures taken in a courtroom or in any of the halls, corridors or approaches thereto during any session of the court or recesses between sessions, and no prisoner, or inmate of the county jail shall be photographed in the jail or in any of the approaches thereto or on his way to or from a session of court."

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

THE TRIBUNE REVIEW PUBLISHING CO., a corporation, and DAVID W. MACK, Plaintiffs,
vs.
HOWARD BUD THOMAS, Defendant.

Civil Action No. 12033

Temporary Restraining Order

AND NOW, March 2nd, 1954, the motion of the plaintiffs, The Tribune Review Publishing Co., and David W. Mack, for temporary restraining order having been presented in open court, and it appearing to the court from the verified complaint herein that the defendant, Howard Bud Thomas, under color of a regulation adopted by the Courts of Westmoreland County, is interfering

with the right of the plaintiffs, The Tribune Review Publishing Co. and David W. Mack, Managing Editor, to gather and publish news, including photographic likenesses of news worthy subjects, and that such acts amount to a denial of the plaintiffs' and others of due process of law and of freedom of speech and of freedom of the press, and that immediate and irreparable loss and damage will result to the plaintiffs before notice can be served and a hearing had on plaintiffs' motion for preliminary injunction in that the plaintiffs will be deprived of any means whatever of photographing witnesses and other newsworthy subjects after they depart from the court house in Greensburg to their residences beyond Westmoreland County, and that said acts amount to a censorship of the press in violation of the 14th Amendment to the Constitution of the United States of America, and that the right of the public to be informed on matters of public interest will be infringed, IT IS ORDERED, DIRECTED AND DECREED—

(a) That the defendant, Howard Bud Thomas, his agents, deputies and others acting under him, under color of the regulation or order of court of February 25th, 1954, on the basis of usage and custom in said county before February 25, 1954, be restrained from enforcing or attempting to enforce the same except insofar as said regulation or order of court relates to court rooms while courts are in session or recesses thereof, or places in such close proximity thereto, as to interfere with the orderly proceedings of the court in the conduct of trials actually in progress, and except insofar as said regulation purports to forbid the photographing of the defendant in custody of the court except with his written consent.

(b) That the defendant, Howard Bud Thomas, his agents, deputies and others acting under him, be restrained from in any manner interfering with the news camera men or others acting for the plaintiffs from photographing witnesses, litigants, prosecutors, defendant, plaintiff, claimant or respondent, or other persons of news worthy interest in the proceeding presently on trial or to be on trial for the purpose of printing and publishing the same until such time as the plaintiffs' motion for preliminary injunction can be heard on notice, and thereafter until the constitutionality of such regulation or order of court and the acts of the defendant, Howard Bud Thomas, in the enforcement of the same can be finally determined provided the consent of such person is first obtained in writing.

Provided that the plaintiffs first give security in the sum of $1,000. for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained; said bond to be approved by the Court or by the Clerk of the Court.

It is further ordered that this order shall expire ten days after entered unless within such time the order, for good cause shown, is extended for a longer period, or unless the defendant consents that it may be extended for a longer time.

It is further ordered that the plaintiffs' motion for preliminary injunction be set down for hearing on Monday, the 8th day of March, 1954, at 10 o'clock, A. M. Court Room No. 2.

JAMES S. GOURLEY
C. J.

3:36 P. M.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

THE TRIBUNE REVIEW PUBLISHING CO., a corporation, and DAVID W. MACK, Plaintiffs,
and
P G PUBLISHING COMPANY, a corporation, Intervening Plaintiff,
vs.
HOWARD BUD THOMAS, Defendant.

Civil Action No. 12033

Opinion

WALLACE S. GOURLEY, Chief Judge:

In this proceeding the plaintiffs and intervening plaintiff are newspaper publishers and the defendant is the Sheriff of Westmoreland County, Pennsylvania.

The matter comes before the court on a complaint in equity to restrain and enjoin the enforcement of a regulation or order issued by the Court of Westmoreland County, Pennsylvania. Westmoreland County is one of sixty-seven counties in the Commonwealth of Pennsylvania.

Said Order as issued by the Court of Common Pleas, Court of Quarter Sessions, and Court of Oyer and Terminer of Westmoreland County, Pennsylvania, provides:

> "No one shall take any pictures inside of the courthouse during any session of the court, or the recesses between sessions, and no person, litigant,

prosecutor, defendant, plaintiff, claimant or respondent, juror, or witness shall be photographed or have his or her or their pictures taken in a court room or in any of the halls, corridors or approaches thereto during any session of the court or recesses between sessions, and no prisoner, or inmate of the county jail shall be photographed in the jail or in any of the approaches thereto or on his way to or from a session of court."

The defendant, Sheriff of Westmoreland County, Pennsylvania, is the highest police authority in said County, and in the exercise of his duties, was empowered and directed by virtue of his office to enforce the mandate of said County Court.

In accordance with the provisions of law, this Court requested the empaneling of a statutory three judge court. Said request was refused for the reason that the order or regulation was local in nature, being issued by a county court, and did, therefore, not relate to the action of an officer of the state or of an order made by an administrative board or commission of the state. Wilentz et al. v. Sovereign Camp Woodmen of the World, 306 U.S. 573; 28 U.S.C.A. §2281 et seq.

Application was made ex-parte for a temporary restraining order, which was granted.

American Bar Association Judicial Canon 35, as adopted September 30, 1937, provides:

"Improper Publicizing of Court Proceedings. Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the court room, during sessions of the

court or recesses between sessions, and the broadcasting of court proceedings, are calculated to detract from the essential dignity of the proceedings, degrade the court, and create misconceptions with respect thereto in the mind of the public, and should not be permitted."

Since I am in agreement with this Canon of the American Bar Association, the Restraining Order issued did not interfere with the order or regulation of the Westmoreland County Court as it related to the taking of photographs in the courtroom of any judge, or places in such close proximity thereto as to interfere with the orderly proceedings of the court, in the conduct of trials actually in progress.

The Temporary Restraining Order provides:

"AND NOW, March 2nd, 1954, the motion of the plaintiffs, The Tribune Review Publishing Co. and David W. Mack, for temporary restraining order having been presented in open court, and it appearing to the court from the verified complaint herein that the defendant, Howard Bud Thomas, under color of a regulation adopted by the Courts of Westmoreland County, is interfering with the right of the plaintiffs, The Tribune Review Publishing Co. and David W. Mack, Managing Editor, to gather and publish news, including photographic likenesses of news worthy subjects, and that such acts amount to a denial of the plaintiffs' and other of due process of law and of freedom of speech and of freedom of the press, and that immediate and irreparable loss and damage will result to the plaintiffs before notice can be served and a hearing had on plain-

tiffs' motion for preliminary injunction in that the plaintiff's will be deprived of any means whatever of photographing witnesses and other news worthy subjects after they depart from the court house in Greensburg, to their residences beyond Westmoreland County, and that said acts amount to a censorship of the press in violation of the 14th Amendment to the Constitution of the United States of America, and that the right of the public to be informed on matters of public interest will be infringed, IT IS ORDERED, DIRECTED AND DECREED—

"(a) That the defendant, Howard Bud Thomas, his agents, deputies and others acting under him, under color of the regulation or order of court of February 25th, 1954, on the basis of usage and custom in said county before February 25, 1954, be restrained from enforcing or attempting to enforce the same except insofar as said regulation or order of court relates to court rooms while courts are in session or recesses thereof, or places in such close proximity thereto, as to interfere with the orderly proceedings of the court in the conduct of trials actually in progress, and except insofar as said regulation purports to forbid the photographing of the defendant in custody of the court except with his written consent

"(b) That the defendant, Howard Bud Thomas, his agents, deputies and others acting under him, be restrained from in any manner interfering with the news camera men or others acting for the plaintiffs from photographing witnesses, litigants, prosecutors, defendant, plaintiff, claimant or respondent,

or other persons of news worthy interest in the proceeding presently on trial or to be on trial for the purpose of printing and publishing the same until such time as the plaintiffs' motion for preliminary injunction can be heard on notice, and thereafter until the constitutionality of such regulation or order of court and the acts of the defendant, Howard Bud Thomas, in the enforcement of the same can be finally determined provided the consent of such person is first obtained in writing.

"Provided that the plaintiffs first give security in the sum of $1,000 for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained; said bond to be approved by the Court or by the Clerk of the Court.

"IT IS FURTHER ORDERED that this order shall expire ten days after entered unless within such time the order, for good cause shown, is extended for a longer period, or unless the defendant consents that it may be extended for a longer time.

"IT IS FURTHER ORDERED that the plaintiffs' motion for preliminary injunction be set down for hearing on Monday, the 8th day of March, 1954, at 10 o'clock A.M., Court Room No. 2.

"3:36 P.M. /s/ WALLACE S. GOURLEY, C.J."

When a court room or facilities in close proximity thereto would be invaded by a reporter or reporters with camera, no judge, with all the power of the law at his command, can maintain the order and decorum essential to the intelligent discharge of the court's proper function.

The defendant appealed from the granting of said Restraining Order to the United States Court of Appeals for the Third Circuit and also filed a writ of prohibition in said appellate court to the Temporary Restraining Order issued by this Court. The appellate court denied the petition for writ of prohibition and dismissed the appeal for want of jurisdiction, without prejudice to the right of the defendant to move the district court for the dissolution of the Temporary Restraining Order, and to appeal if such motion be denied or a preliminary injunction be issued after hearing.

Application has been made for the dissolution of the Temporary Restraining Order previously entered by this Court, a full and complete hearing has been held on said motion and testimony has been offered in support of the application for a preliminary injunction.

Pending the determination of the questions presented, the Court extended the Temporary Restraining Order and clarified its intention, said clarification order being as follows:

> "On the 2nd day of March, 1954, the Court entered a Temporary Restraining Order pending the disposition of the issues raised in the within proceeding wherein the defendant, his agents and others acting under him were restrained from enforcing or attempting to enforce the order of the Court of Common Pleas, Court of Quarter Sessions and Court of Oyer and Terminer, Westmoreland County, Pennsylvania, issued on the 25th day of February, 1954, if written permission was given by the defendant or the person concerned to the taking of their photograph on the premises identified as the Westmore-

land County Court House, except insofar as said regulation or order of court related to court rooms while courts are in session or recesses thereof, or places in such close proximity thereto, as to interfere with the orderly proceedings of the court in the conduct of trials actually in progress.

"It appears that some confusion exists as to the interpretation to be given the order issued by this Court on the 2nd day of March, 1954, as to the phrase 'places in such close proximity to the court rooms as to interfere with the orderly proceedings of the court in the conduct of trials actually in progress.'

"It appears that clarification should be given to the intention of the court in the issuance of a temporary restraining order pending the final disposition of the motion to quash the temporary restraining order and the adjudication of the petition for preliminary injunction as to the enforcement of said order as issued by said Westmoreland County Courts on the 25th day of February, 1954.

"It is not in dispute that the Orphans' Court of Westmoreland County, Pennsylvania, has not entered an order similar to that issued by the members of the Courts of Common Pleas, Quarter Sessions and Oyer and Terminer, and, therefore, no basis exists for this court to enter an order affecting the temporary restraining order pending the disposition of the issues as to the Orphans' Court of Westmoreland County, Pennsylvania.

"It would appear to this Court in the absence of some unusual situation, places in such close

proximity to the court room where court is actually being held should include only those facilities on that part of the floor of the court house where the court room is located, which is adjoining to or a part of the facilities commonly known, designated and accepted as the facilities or quarters of each judge for the performance and administration of his duties.

"On the basis of the modification just expressed, the order issued by this Court on the 2nd day of March, 1954, together with the bond in the amount of $1,000.00 entered on the same date, is in each instance continued pending the entry of an order by this Court on the motion to quash the temporary restraining order and an adjudication of the petition for the entry of a preliminary injunction restraining the effectiveness of the order issued by the Westmoreland County Court on the 25th day of February, 1954."

Strange as it seems, the question appears to be one of first impression.

In view of the importance thereof and the indefiniteness of the law as to the duty of this Court and the merits of the proceeding, it was impossible for the court to dispose of the motion to dissolve the temporary restraining order without reflected judgment and an exhaustive research of the law in connection therewith.

MOTION TO QUASH OR DISSOLVE TEMPORARY RESTRAINING ORDER

Determination will, therefore, first be made of the motion to dissolve the temporary restraining order.

It is contended that the United States District Court ought not to take jurisdiction in this proceeding for the reason that it does not really or substantially involve a dispute or controversy properly within the jurisdiction of this Court, and that the proceeding is not properly laid in the Federal District Court.

Petitioners claim the regulation or order deprives them of their right to gather, publish and print news through the photographic reproductions of newsworthy subjects, and amounts to an illegal censorship of the press, a denial of the right of free speech, and a deprivation of their property rights without due process of law.

Freedom of the press is a crucial cornerstone of our Anglo-Saxon democratic institutions. To impede or vitiate its tenor by administrative or legislative fiat is inimical to our cherished freedoms—for the preservation of which the judicial branch of our state and federal governments are primarily constituted.

There has been a tendency to interfere with the fundamental right of the people to be kept thoroughly informed as to the events of the day. The courts should be alert and vigilant to make positive that sources of news should not be undermined, such as through the growing practice of secrecy in government on national, state and local levels; the growing tendency of public officials to feel that they are not accountable to the

public; that they can conduct the business of their offices in secret; that they may seal or impound public records; that they may divulge only such information as they think is good for the people to know; that they may extend "military security" into areas of news which have no bearing on the nation's security.

This is the pattern by which the Facists in Italy, the Nazis in Germany, the Communists in Russia, the Peronistas in Argentina began to limit the right of their people to know, forced their newspapers into complete subjection and were able to take from them all their other democratic rights as well.

Regrettably or not, the misfortunes and frailties of neighbors and public figures are subjects of considerable interest and discussion to the rest of the population, and the public interest in obtaining information becomes dominant over the individual's desire. Where any person has achieved or has had thrust upon him a questionable and indefinable status of a public figure, it is a news item.

News has been defined as "not a mirror of social conditions, but the report of an aspect that has obtruded itself." Unusual things make news; according to the old saying of the newspaper profession that if a dog bites a man, it is not news — but if a man bites a dog, it is.

It is illusory, therefore, to expect the newspapers in the publication of news to retreat into the type of ivory tower to which those who sigh for the past would relegate them.

The fact that this petition may have been precipitated and brought into glaring focus by the notorious criminal proceeding now in progress in Westmoreland

County, as relates to the Phantom or Turnpike Killings, must not blur the evaluation of issues which far transcend in magnitude and significance any momentary considerations.

For the decision to be enunciated must affect all matters which arise in the Westmoreland County Courts, whether they be actions in divorce, civil suits, or criminal trials, and the pronouncements to be entered must be of general application, providing, as they must, adequate safeguards for the dignified and judicious administration of the Courts of Westmoreland County and simultaneously safeguarding the basic American right of a free press.

Under the Fourteenth Amendment the federal judicial power can redress the wrong done by a state officer misusing the authority of the State with which he is clothed; under such circumstances inquiry whether the State has authorized the wrong is irrelevant. Ex parte Young, 209 U.S. 123; Barney v. New York, 193 U.S. 430; Home Telephone and Telegraph Company v. City of Los Angeles, 227 U.S. 278.

The Fourteenth Amendment safeguards the freedom of the press from state aggression. Any judicial decree which violates vested rights is within the protection of this amendment. Nesbit v. Riesenman, 298 Pa. 475, c.d. 281 U. S. 754.

The freedom of the press guaranteed by the Constitution embraces at least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment. Thornhill v. State of Alabama, 310 U.S. 88.

The jurisdiction of the District Court over this action is founded on the Act of Congress of June 25, 1948, C. 646, Section 1, 62 Stat. 932 (28 U.S.C.A. 1343), which provides in part as follows:

> "Civil rights.—The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> * * * * * * *
>
> "(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States. * * *"

Freedom of speech and of the press are among the civil rights to which this jurisdictional statute extends. Hague v. C.I.O., 307 U.S. 496.

Said Act of Congress was promulgated by virtue of Section 5 of the Fourteenth Amendment to the Constitution of the United States which provides Congress shall have power to enforce, by appropriate legislation, the provisions of this Article. Said Article provides, as it applies to the matters involved in this proceeding, as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty

or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

A State may act through different agencies, either by its legislative, its executive, or its judicial authorities; and the prohibitions of the Fourteenth Amendment to the Constitution of the United States extend to all action of the State denying equal protection of the laws, whether it be action by the legislative, executive or judicial branch of the State government. Congress may enforce the prohibitions whenever they are disregarded by any branch of the State government. The mode of enforcement is left to the discretion of Congress.

The constitutional provisions of the Fourteenth Amendment, therefore, means that no agency of a state or of the officers or agents by whom its powers are asserted, and this includes the judicial branch of the government, shall deny to any person within this jurisdiction the equal protection of the laws. Therefore, any person, regardless whether it be the legislative, executive or judicial branch of the government, who by virtue of his public position under a State government, deprives another of property, life or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition.

Several rights, such as are guaranteed by the Constitution of the United States against State aggression, cannot be impaired by the wrongful acts of individuals unsupported by state authority in the shape of laws, customs or judicial or executive proceedings. The

wrongful act of an individual, unsupported by any such authority, is simply a private wrong, or a crime of that individual; an invasion of the rights of the injured party; it is true, whether they affect his person, his property, or his reputation; but if not sanctioned in some way by the state, or not done under state authority, his rights remain in full force, and may presumably be vindicated by resort to the laws of the state for redress.

Whoever, by virtue of public position, under a state government, deprives another of property, life or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and, as he acts in the name and for the state, and is clothed with the state's power, his act is that of the state. Barney v. City of New York, 193 U. S. 430, 439, 440.

Since the state, for present purposes, can only act through functionaries, the question naturally arises what functionaries, acting under what circumstances, are to be deemed the state for purposes of bringing suits in the Federal Courts on the basis of illegal state action. The problem is beset with inherent difficulties, and not unnaturally has had a fluctuating history in the decisions of the court. It is not to be resolved by abstracting considerations such as the fact that every official who purports to wield power covered by a state is pro tanto the state. Otherwise every illegal discrimination by a policeman on the beat would be state act for the purpose of suit in a Federal Court. My question is not whether a remedy is available for such an illegality, but whether it is available in the first instance in a Federal Court. Such a problem of federal judicial con-

trol must be placed in the historic context of the relationship of the Federal Courts to the states, with due regard for the natural sensitiveness of the states, and for the appropriate responsibility of state courts to correct the act of lower state courts and state officials. Snowden v. Hughes, et al., 321 U.S. 1, 16, 17.

I believe the order and regulation promulgated by the Westmoreland County Court was issued under color of state law. It further appears that a custom or usage existed in the Courts of Westmoreland County, Pennsylvania, prior to the adoption of said order or regulation in which photographers were permitted to take pictures of any person in the court house where the business of the court was conducted other than in the courtroom or in the area in close proximity thereto while a member of the court was in session or involved in the trial of a proceeding.

It is provided by statute in Pennsylvania:

> "Each of the said courts (of Common Pleas) shall have full power and authority to establish such rules for regulating the practice thereof respectively, and for expediting the determination of suits, causes and proceedings therein, as in their discretion they shall judge necessary or proper: Provided, that such rules shall not be inconsistent with the Constitution and laws of this Commonwealth." Act of 1836 P.L. 784, section 21, 17 P.S. Section 2076.

The Supreme Court of Pennsylvania is vested with the power to prescribe by general rule, inter alia, the practice and procedure in civil actions at law and in equity for the Courts of Common Pleas in every county.

Said Act further provides that rules promulgated shall be consistent with the Constitution and shall neither abridge, enlarge nor modify the substantive rights of any litigant. The Supreme Court, however, is not vested with the right to promulgate rules or regulations to "the Courts of Oyer and Terminer, Courts of Quarter Sessions, and the practice and procedure in said courts shall remain and continue as prescribed by existing law." Act of 1937, June 21, P.L. 1982, as amended, 17 Pa. P.S. §61 et seq.

It has been further provided that each of the Courts of Common Pleas may adopt additional local rules for the conduct of its business, but shall not be inconsistent with or in conflict with said rules prescribed by the Supreme Court of Pennsylvania. Act of 1937, June 21, P.L. 1982; Act of 1939 P.L. 14, Section 1, 17 Pa. P.S. §62.

In connection with the conduct of jury trials, the Supreme Court of Pennsylvania has provided as follows:

Subject to the requirements of due process of law and the constitutional rights of the parties, the court may make and enforce rules and orders covering any of the following matters, inter alia:

> Regulating or excluding the public or persons not interested in the proceedings whenever the court deems such regulation or exclusion to be in the interest of the public good, order or morals. Rule 223 (a)(4).
>
> During the trial of actions, the court shall prohibit the taking of photographs and motion pictures in the courtroom. Rule 223 (b).

Each of the above rules was adopted by the Supreme Court of Pennsylvania on February 8, 1938, effective March 20, 1939.

The judges of the County Courts of Oyer and Terminer and Quarter Sessions have been delegated by the Legislature of the Commonwealth of Pennsylvania full power and authority to establish such rules for regulating the conduct of the business of said courts, and for expediting the determination of suits, causes and proceedings therein, as in their discretion they shall judge necessary or proper; provided, that such rules shall not be inconsistent with the Constitution and laws of this Commonwealth. Act of March 31, 1860, P.L. 427 §32; 17 Pa. P.S. §361(6).

It, therefore, must be concluded that the rule of court which is brought into issue in the instant proceeding was adopted on the basis of legislative and judicial authority. The rule as it would apply to the proceedings of the Court of Common Pleas would stem from the rules of the Supreme Court of Pennsylvania and from the authority delegated by the Legislature, while the authority for the rule as it would apply to the Court of Quarter Sessions and Court of Oyer and Terminer would be based solely on legislative authority.

Even in the absence of any statutory provision or regulation, courts have inherent power to make their own rules of practice and procedure to facilitate the business of the court and to promote the orderly and expeditious administration of justice for the benefit of the parties as well as for the benefit of the court. 21 C.J.S. §170 (b)(1).

It is clear of doubt that the act, rule or regulation of the Court of Westmoreland County, Pennsylvania, pertains to the subject of said courts' powers and authority. The authority must be tested by assuming that the officer possesses the power if the act be one which there would not be opportunity to perform but for possession of some state authority.

The Federal Court is therefore not deprived of jurisdiction over the subject matter of this proceeding, because the question can be adjudicated or the constitutionality of the rule or regulation of the Westmoreland County Court adjudicated through application of state law in State Courts. The jurisdiction is therefore proper in this Court and the motion to dismiss or quash the Temporary Restraining Order previously issued and continued pending adjudication of the matter before this Court will be refused.

SHOULD THE PROCEEDING BE ADJUDICATED OR STAYED PENDING DETERMINATION OF STATE COURT

The problem of the determination of the issues by this Court or, in the alternative, the staying of the proceeding pending determination by the Supreme Court of Pennsylvania is most troublesome and complex.

It is difficult to reconcile the many authorities in which consideration has been given as to when the United States District Court, where jurisdiction exists, should proceed to hear and adjudicate the issues raised in connection with the provisions of the Federal Constitution when remedial action might lie under State law, and the authorities which conclude that the proceeding

in the Federal Court should be stayed and jurisdiction retained until a determination of the issues by the highest appellate authority in the state where the question has been raised.

The authorities which tend to indicate that where a constitutional question is raised as to the act of a state officer, depriving a person of a constitutional right, should be adjudicated by the Federal Court without referring the matter to the State jurisdiction are as follows: Lane v. Wilson, 307 U.S. 268; Railroad and Warehouse Commission of Minn. v. Duluth Street RR Co., 273 U.S. 625; Gobitis et al. v. Minersville School Dist. et al., 21 F. Supp. 581; Mitchell v. Wright et al., 5 Cir., 154 F. 2d 924; Hague v. C.I.O., supra; Westminster v. Mendez, 161 F. 2d 774; Home Telephone & Telegraph Co. v. City of Los Angeles, supra.

The authorities that seem to indicate that where jurisdiction exists the proceeding should be stayed in the Federal Court until a determination of the issues by the highest tribunal in the State court are as follows: Alabama Public Service Comm. v. Southern RR Co., 341 U.S. 341; Shipman v. Du Pre, 339 U.S. 321; RR Commissioner of Texas v. Pullman Co., 312 U.S. 496; Great Lakes Dredge & Dock Co., et al. v. Huffman, 319 U.S. 293; Wilson v. Beebe (Statutory Court) 99 F. Supp. 418; City of Memphis v. Cumberland Telephone and Telegraph Co., 218 U.S. 624; A. F. of L. v. Watson, 327 U.S. 582; Chicago v. Fieldcrest Dairies, Inc., 316 U.S. 168; Matthews v. Rodgers, 284 U.S. 521; Barney v. City of New York, supra; Snowden v. Hughes, supra; Natural Gas Pipeline v. Slattery, 302 U.S. 300.

Resolving the problem of trying to reconcile the various decisions, I conclude since the order and regulation presented for adjudication was promulgated under color of state authority or law, it is the duty of the court to stay the proceeding in this Court pending a determination by the Supreme Court of Pennsylvania.

In the taking and publication of photographs, the law has recognized the privilege of privacy which reposes certain limitations upon the freedom of the press. C.J.S. Constitutional Law § 213, page 630.

Not only has the federal government provided constitutional safeguards for the preservation of a free and untrammeled press, but the states, too, have jealously and zealously enacted similar constitutional insulation from external assaults upon this precious freedom. The Pennsylvania Constitution gives firm expression to a free press.

Thus, Article 1 Section 7 provides, inter alia:

> "The printing press shall be free to every person who may undertake to examine the proceedings of the Legislature or any branch of government and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty . . ."

Viewing the terms of the rule or order which this complaint petitions to be enjoined, more particularly as it applies to a criminal proceeding of general public interest now in process of trial, specific constitutional

provision exists guaranteeing the accused a speedy public trial. Constitution of Pennsylvania, Article L Section 8.

It is further provided that all courts shall be open. Constitution of Pennsylvania, Article I Section 11.

Whether or not the rule or order in question conflicts with the aforementioned provisions of the Constitution of Pennsylvania is a matter for proper judicial interpretation.

Equitable relief may be granted only when the District Court, in its sound discretion exercised with the scrupulous regard for the rightful independence of state governments which at all times actuate the Federal courts, is convinced that the asserted federal right cannot be preserved except by granting the extraordinary relief of an injunction in the Federal courts. Considering that few public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies, the usual rule of comity must govern the exercise of equitable jurisdiction by the District Court. Alabama Public Service Comm. v. Southern Ry. Co., supra; Great Lakes Dredge & Dock Co., et al. v Huffman, supra; A. F. of L. v. Watson, supra.

The mere illegality or unconstitutionality of a state or subdivisional law or order is not in itself a ground for equitable relief in the courts of the United States. If the remedy at law is plain, adequate, and complete, the aggrieved party is left to that remedy in the State courts, from which the cause may be brought to this Court for review if any federal question be involved. Great Lakes

Dredge & Dock Co., et al. v. Huffman, supra; Matthews v. Rodgers, supra.

There are cogent reasons for requiring resort in the first instance to the State tribunal when the particular method by which the local officer has chosen to exercise authority is also attacked, for there always exists the possibility of modification of such rule or order upon which the actions of such state officers are premised. Natural Gas Pipeline v. Slattery, supra.

The resources of equity are equal to an adjustment that will avoid needless friction with State policies. Considerations of delay, inconvenience, and cost do not call for a different result. For we are here concerned with the much larger issue as to the appropriate relationship between federal and state authorities functioning as a harmonious whole. Chicago v. Fieldcrest Dairies, supra.

The authority for petitioners to secure relief in the highest tribunal of the Commonwealth of Pennsylvania as a court of original jurisdiction is well recognized and clearly chartered both by statute and legal construction.

Article V Section 3 of the Constitution of Pennsylvania confers upon the Supreme Court of Pennsylvania original jurisdiction of mandamus to courts of inferior jurisdiction within the state. Under the Act of June 8, 1893, P.L. 345, it is specifically provided that a writ of mandamus may be used to procure the enforcement of a public duty or to compel a judge of inferior jurisdiction to perform his duties. Commonwealth ex rel. Duff, Atty. General v. Keenan et al., 347 Pa. 574.

The judges of the Supreme Court have full power and authority when, and as often as there may be occa-

sion, to issue all remedial writs and processes. 17 Pa. P.S. § 48.

When the issue posed concerns the promulgation of rules or orders which contravene constitutional authority, the question of the exercise of discretionary authority is not raised, and the resort to mandamus is in order. Funk v. Van Swearingen, 251 Pa. 229; Commonweath ex rel. Duff, Atty. General v. Keenan et al., supra; Blazis v. Bechtel, 256 Pa. 529; Powel's Estate, 209 Pa. 76; Johnson's License, 165 Pa. 315.

The power on the part of the Supreme Court of Pennsylvania to issue a writ of prohibition has never been doubted. Such a writ is proper not only whenever a court acts outside of its jurisdiction but also when there is an abuse of jurisdiction. The object of the writ being to restrain subordinate judicial tribunals of every kind from exceeding their jurisdiction, its use in all proper cases should be upheld and encouraged since it is of vital importance to the due administration of justice that every tribunal vested with judicial functions should be confined strictly to the exercise of those powers with which it has been by law entrusted.

The Supreme Court of Pennsylvania has exercised this power with comparative frequency. Carpentertown Coal & Coke Co. v. Laird, 360 Pa. 94; First Congressional District Election, 295 Pa. 1; Park's Petition, 329 Pa. 60; Philadelphia County Grand Jury Investigation Case, 347 Pa. 316; cf. Dauphin County Grand Jury Investigation Proceedings (No. 1) 332 Pa. 289; Commonwealth v. Judge Smart, 368 Pa. 630; McNair's Petition, 324 Pa. 48.

The power of controlling the action of inferior courts is so general and comprehensive that it has never been limited by prescribed forms of procedure or by the particular nature of the writs employed for its exercise. It may further be pointed out that Article V, section 3, of the Constitution of Pennsylvania expressly permits the exercise of the Supreme Court of original jurisdiction in cases of mandamus to courts of inferior jurisdiction, and prohibition is the exact counterpart of mandamus, the only difference being that the latter commands certain things to be done whereas prohibition forbids the doing of certain things which ought not to be done. Carpentertown Coal & Coke Co. v. Laird, supra; Commonwealth v. Mellon National Bank and Trust Co., 360 Pa. 103.

Since the rule of court in question has been promulgated on the basis of judicial and legislative authorities, which specifically provided that no rule or regulation of inferior courts of the Commonwealth of Pennsylvania should be violative of the laws or the Constitution of the Commonwealth of Pennsylvania, although jurisdiction exists in this court to determine the issues by virtue of congressional enactment and in order not to interfere with the domestic policies of the State of Pennsylvania, it appears to me proper and fitting that the constitutionality of the rule of court should be considered by the highest tribunal in the Commonwealth of Pennsylvania before an adjudication of the issues in this jurisdiction, as they relate to the Constitution of the United States, is entered.

If the rule or order promulgated by the Westmoreland County Courts were final and conclusive, it is my judgment that the United States District Court would

be a proper forum in the first instance to render a determination of the issues posed.

But where the rule or order may be stricken down as conflicting with the Rules of the Supreme Court of Pennsylvania or the legislative authority of the Commonwealth of Pennsylvania, a due regard must be had for the natural sensitiveness of the states and for the appropriate responsibility of State courts to correct the action of lower state courts and state officials. Snowden v. Hughes, supra.

Therefore, after reflected judgment, it is my conclusion that it is a proper course to retain the proceeding that is now pending until a definite determination of the state questions is made by the Supreme Court of the Commonwealth of Pennsylvania. Ample authority exists for the Supreme Court of Pennsylvania to assume original jurisdiction.

FINDINGS OF FACT

1. The plaintiff, The Tribune Review Publishing Company, is a corporation organized and existing under the laws of Pennsylvania, and having its principal office or place of business in the City of Greensburg, Westmoreland County, Pennsylvania.

2. The plaintiff, David W. Mack, is General Manager of the plaintiff, The Tribune Review Publishing Company, and is a resident of the City of Greensburg, Westmoreland County, Pennsylvania.

3. The plaintiffs are publishers of the Greensburg Morning Review and the Greensburg Daily Tribune, respectively morning and afternoon newspapers of gen-

eral circulation in Westmoreland County, Pennsylvania, and elsewhere. Said papers are each published five days in each week.

4. Intervening plaintiff, P G PUBLISHING COMPANY, is the publisher of the "Pittsburgh Post-Gazette", a daily morning newspaper of general circulation in Allegheny County, Pennsylvania, and surrounding counties.

5. The defendant, Howard Bud Thomas, is the duly elected and acting Sheriff of Westmoreland County, Pennsylvania.

6. By Order dated February 25, 1954, Richard D. Laird, President Judge, Edward G. Bauer, Judge, and John M. O'Connell, Judge, of the Courts of Common Pleas, Quarter Sessions, Oyer and Terminer, General Jail Delivery, of Westmoreland County, Pennsylvania, adopted, as Rule No. 205(b), the following Rule of Court:

> "No one shall take any pictures inside of the Court House during any session of the Court or the recesses between sessions, and no person, litigant, prosecutor, defendant, plaintiff, claimant or respondent, juror or witness shall be photographed or have his or her or their pictures taken in a court room or in any of the halls, corridors or approaches thereto during any session of the Court or recesses between sessions, and no prisoner or inmate of the County Jail shall be photographed in the jail or in any of the approaches thereto or on his way to or from a session of Court."

7. The fourth judge comprising said Court, Judge George H. McWherter, was ill at the time said regulation was signed by the other Judges.

8. Said regulation was filed in the offices of the Prothonotary of the Common Pleas Court and the Clerk of the Court of Quarter Sessions and Court of Oyer and Terminer.

9. Said regulation contained no penal provision, and in itself provided no method for the enforcement of the same, and specified no tribunal in which violators of said regulation might be tried or heard.

10. Greensburg is the county seat of Westmoreland County, is within 30 miles of Pittsburgh and is within the area in which the intervening plaintiff normally gathers and publishes news.

11. The defendant, Howard Bud Thomas, Sheriff of Westmoreland County, at or about the time said regulation was filed, announced that he would, by appropriate means, enforce said regulation, and subsequently advised the plaintiff, David W. Mack, and news photographers that they would be arrested and charged with contempt of court if photographs for publication in newspapers were taken in the court house in violation of said regulation, and requested news photographers, upon entering the court house, to deposit their cameras in the Sheriff's office.

12. The court house in Greensburg is a structure consisting of a basement and four floors. The basement has an entrance at street level from Pittsburgh Street, and the first floor has an entrance somewhat above street level from Main Street;

The basement of said structure is occupied by public offices, such as the clerk's office, the Commissioner's annex, the tax assessment office, the Recorder

of Deeds annex, booths for telephone operators, hearing rooms and lavoratories;

The first floor of said structure is occupied by the Sheriff's office, the Prothonotary's office, and the Recorder of Deeds office, the Register of Wills Office, the Commissioners Office and the Controller's office;

The second floor of said court house is occupied by two court rooms, which are separated by a corridor and hallway approximately fifty feet by seventy-two feet, Judges' chambers, a Public Library, an attorneys room and a hearing room, and a room used partly as a jury room and partly as a hearing room;

The third floor of said court house has a court room and corridor approximately the same size as that on the second floor, and is also occupied by the District Attorney's office, a photostating room and a hearing room;

The court rooms on the second floor extend to the third floor of the structure and the entrances to the balconies of said rooms are from the third floor;

The fourth floor of said structure contains two court rooms, which are separated by a corridor of approximately the same size as on the second floor. One of said court rooms is occupied by the Orphans' Court of Westmoreland County, and also on the fourth floor is the registration office, the coroner's office, and offices which are occupied by branches of the sheriff's office and the clerk's office.

13. Said floors are reached by stairways connecting the several floors and by two elevators which serve all five floors of the building.

14. On the 2nd day of March, 1954, at about 8:00 o'clock, A.M., before any court was in session, the defendant, Howard Bud Thomas, stationed guards or deputies at various points about the court house, and when camera-men approached, he informed them of said court regulation, and requested them to deposit their cameras in his office, which in all instances was complied with.

15. Between 10:00 and 10:30 o'clock, A.M., on March 2nd, 1954, the plaintiff, David W. Mack, and one Castle Pyle, a news photographer, both representing the plaintiff, The Tribune Review Publishing Company, entered the court house while court was in session for the purpose of photographing newsworthy persons who were in and about the court house attending the trial of one John Wesley Wable, who was on trial for murder, when they were accosted by the defendant, Howard Bud Thomas, and asked whether they were familiar with the regulation of the court, and they replied they were. The said Howard Bud Thomas then advised them not to take any pictures. The plaintiff, David W. Mack, asked what the penalty would be if they did take pictures, and the defendant, Howard Bud Thomas, said that if pictures were taken they would be arrested and charged with contempt of court. The plaintiff, David W. Mack, and the said Castle Pyle thereupon left the court house.

16. For one hundred years prior to the adoption of the regulation of February 25th, 1954, photographs have been taken in all parts of the court house with the exception of the court rooms while court is in session, and said photographs have been used for reproduction in the newspapers.

17. At the time of the presentation of the petition for a temporary restraining order and at the time of the hearing on the motion for preliminary injunction only one court was in session in said court house in Greensburg, and that on the second floor of the court house, on the north side thereof, known as Court Room No. 2, in which the said John Wesley Wable was being tried for murder although in the interval between the presentation of said motion for temporary restraining order and said hearing three of said court rooms had been in use in the conduct of trials.

18. The circumstances surrounding the killings for which the said John Wesley Wable is on trial were such that they attracted nation-wide publicity, and the nation-wide publicity probably resulted in the detection and apprehension of the said John Wesley Wable.

19. The trial of the said John Wesley Wable, as the phantom killer of the Pennsylvania Turnpike, which was being conducted at the time of the hearing on the motion for preliminary injunction, is also the subject of local and nation-wide publicity, and there are present in the court house in the neighborhood of one hundred witnesses, many of whom are newsworthy. Included in the persons present in the court house at the trial of said case are the defendant, John Wesley Wable, his family, persons with whom he was making his home in Cleveland, Ohio, who were instrumental in giving information to the police, police officers of Cleveland, Ohio, a pawn broker with whom he pawned the gun used in the killings, and a watch allegedly taken from one of the victims, deputy sheriffs, police officers and others who participated in a chase near Albuquerque, New Mexico, which

resulted in his apprehension, county detectives who worked on the investigation, state police who worked on the investigation, ballistic experts, a tire print expert, a news photographer who photographed the decedent's truck and the accident scene immediately after discovery of the slaying, the widow and daughter of the victim, prosecution and defense counsel, the Sheriff of Westmoreland County, and the Trial Judge. Said persons, during said trial and recesses thereof, were moving in and about the corridors and portions of the court house other than the court rooms.

20. The actual trial of said defendant and the persons participating therein was the subject of widespread local and national interest.

21. The Court takes judicial notice that in the normal course of events that there will be numerous court proceedings, both criminal and civil, in which newsworthy persons will be present in the court house in Greensburg, Westmoreland County, Pennsylvania, and the testimony shows that at the May 1954 Term of Court, there are scheduled for trial in said courts and in said county a number of vote fraud trials in which there is widespread local interest.

22. Both The Tribune Review Publishing Company, the plaintiff, and P. G. Publishing Company, the intervening plaintiff, have substantial capital investments in news photographic equipment and printing and publishing equipment. The intervening plaintiff, P. G. Publishing Company, has an investment of $10,000 in photographic equipment, and makes an annual expenditure of $75,0000 in the taking and publishing of pictures in

the publication of its newspaper, the Pittsburgh Post Gazette.

23. David W. Mack, the individual plaintiff, as managing editor of the Greensburg Morning Review and the Greensburg Daily Tribune, makes his livelihood from the publication of said papers.

24. On March 2, 1954, upon petition of plaintiffs, The Tribune Review Publishing Company and David W. Mack, this Court issued a Temporary Restraining Order restraining the defendant, Howard Bud Thomas, from the performance of certain acts in enforcement of the Rule of Court of Westmoreland County; and the said Temporary Restraining Order was served upon the defendant on March 3, 1954 by a deputy U. S. Marshal.

25. The defendant, his agents, deputies and others acting under him have complied with the said Temporary Restraining Order.

26. On March 9, 1954, this Court issued a "Clarification Memorandum on Temporary Restraining Order issued on March 2, 1954" for the purpose of clarifying the intention of the Court in the issuance of the said Temporary Restraining Order.

CONCLUSIONS OF LAW

1. This Court has jurisdiction of this case because it arises under the First and Fourteenth Amendments to the Constitution of the United States and under the Act of Congress of June 25, 1948, C. 646, 62 Stat. 932 (28 U.S.C.A. 1343).

2. The right of a free press is guaranteed by the 14th Amendment to the Constitution of the United

States, and is protected against invasion by the States or by State agencies.

3. The right of freedom of the press is protected by Article I Section 7 of the Constitution of Pennsylvania.

4. The right of the public to be informed as to what is happening within its government, including its courts, is an integral part of the right of free press and free speech.

5. The right of a defendant to a speedy and public trial is definitely interwoven in the judicial systems of the United States and of the States with the guaranteed and protected right of a free press.

6. The order or regulation promulgated by the Westmoreland County Court was issued under color of state law, more particularly through authority delegated by the Supreme Court of the Commonwealth of Pennsylvania and the Legislature of the Commonwealth of Pennsylvania.

7. Since jurisdiction exists in this court, the motion to dismiss or quash the temporary restraining order must be denied.

8. To avoid needless friction with state policies, the usual rule of comity must govern the exercise of equitable jurisdiction by the United States District Court.

9. Authority exists for the petitioners to secure relief in the Supreme Court of Pennsylvania as a court of original jurisdiction.

10. The maintenance of appropriate relationship between federal and state authorities functioning as

a harmonious whole requires a stay of the proceeding in this court pending determination of the state questions by the Supreme Court of Pennsylvania.

11. After determination of the questions by the Supreme Court of Pennsylvania, if either party feels aggrieved, on application to this court an adjudication will be immediately entered on the application for preliminary injunction.

12. I conclude, therefore, that this court should retain the instant proceeding until a determination of the state question is made by the highest tribunal in the Commonwealth of Pennsylvania.

13. I shall direct that the proceeding in this court be stayed pending a decision of proceedings to be brought with reasonable promptness in the Supreme Court of Pennsylvania to have adjudicated the legality of the order or regulation issued by the Courts of Westmoreland County.

14. At such time as the issues are adjudicated by the Supreme Court of Pennsylvania, and it is believed by any of the parties that such determination conflicts with or is at variance with basic constitutional rights, upon proper application to this court, I shall immediately proceed to adjudicate the application for preliminary injunction together with the entry of Findings of Fact and Conclusions of Law.

15. If additional hearing or argument is requested by an interested party, the request will be given prime consideration on the docket of this court, after which final adjudication will be promptly entered.

An appropriate Order is entered.

ORDER

AND NOW, this 12th day of March, 1954, IT IS ORDERED, DIRECTED AND DECREED that proceedings in this court be stayed pending a determination of proceedings to be brought with reasonable promptness in the Supreme Court of Pennsylvania to have adjudicated the legality of the order or regulation issued by the Courts of Westmoreland County.

IT IS FURTHER ORDERED that the Temporary Restraining Order of March 2, 1954, and Clarification Order of March 8, 1954 are continued in effect until March 22, 1954, at 12:00 Noon, at the end of which period of time the said Temporary Restraining Order is dissolved unless at said time or prior thereto an order is issued by the Supreme Court of the Commonwealth of Pennsylvania, continuing said Order in effect.

IT IS FURTHER ORDERED that at such time as the issues are adjudicated by the Supreme Court of Pennsylvania, and it is believed by any of the parties that such determination conflicts with or is at variance with basic constitutional rights, upon proper application to this court, this Court shall provide any additional hearing necessary to effectuate a prompt adjudication and make appropriate Findings of Fact and Conclusions of Law.

IT IS FURTHER ORDERED that bond in the amount of $1,000 is to be continued pending the continuance and effectiveness of the Restraining Order now in effect.

WALLACE S. GOURLEY
Chief Judge

IN THE
SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

No. 1950 Miscellaneous Docket.

IN THE MATTER OF
The Application of THE TRIBUNE REVIEW PUBLISHING CO., a corporation, and DAVID W. MACK for a Writ of Prohibition directed to RICHARD D. LAIRD, President Judge, EDWARD G. BAUER, Judge, and JOHN M. O'CONNELL, Judge, a majority of the Court of Common Pleas, Court of Quarter Sessions and Court of Oyer and Terminer of Westmoreland County, Pennsylvania.

Petition for Writ of Prohibition.

To the Honorable, the Chief Justice and Justices of Said Court:

The petition of The Tribune Review Publishing Co., a corporation, and David W. Mack, RESPECTFULLY REPRESENTS:

1. The petitioner, The Tribune Review Publishing Co., is a corporation organized and existing under the laws of Pennsylvania, and having its principal office or place of business in the City of Greensburg, Westmoreland County, Pennsylvania.

2. The petitioner, David W. Mack, is General Manager of the petitioner, The Tribune Review Publishing Co., and is a resident of the City of Greensburg, Westmoreland County, Pennsylvania.

3. The petitioners are publishers of the Greensburg Morning Review and the Greensburg Daily Tribune, respectively morning and afternoon newspapers of general circulation in Westmoreland County, Pennsylvania, and elsewhere. Said papers are each published five days in each week.

4. The respondents, Richard D. Laird, Edward G. Bauer and John M. O'Connell, are respectively the President Judge and Judges of the Court of Common Pleas, Court of Quarter Sessions and the Court of Oyer and Terminer of Westmoreland County, Pennsylvania, and constitute a majority of said Court. The fourth Judge, George H. McWherter, is and was at all times hereinafter stated ill and confined to his home.

5. The Court of Common Pleas, the Court of Quarter Sessions and the Court of Oyer and Terminer of Westmoreland County, Pennsylvania, did, on the 25th day of February 1954, adopt a regulation or order of court forbidding any one to take any pictures inside of the court house during any session of the court or the recesses between the session, and forbidding any person, litigant, prosecutor, defendant, plaintiff, claimant or respondent, juror or witness to be photographed, or to have his or her or their pictures taken in the court room, or in any of the halls or corridors or approaches thereto during any session of the court or recess between sessions, and forbidding the photographing of any prisoner or inmate of the county jail in the jail or in any of the approaches thereto, or on his way to or from a session of the court. A copy of said regulation or order is attached hereto made a part hereof, and marked Exhibit "A".

6. The court house in Greensburg is a spacious structure, consisting of a basement and four floors. The basement is occupied entirely by public offices. The main or first floor entirely by public offices. The second floor is occupied by two court rooms, a public library, and consultation rooms and hearing rooms. Said court rooms on the second floor are separated by a spacious corridor. The third floor of said court house has one court room and other public offices, as well as a large corridor. The fourth floor of said court house has two court rooms, one of which is occupied by the Orphans' Court, and other public offices and a spacious corridor.

7. The court house is so constructed that photographs can be taken in the basement and first or main floor of the court house, and in the corridors and consultation rooms and hearing rooms on the second, third and fourth floors without any possible interference with court proceedings while courts are in session.

8. On March 1st, 1954, at 9:00 o'clock, A. M., the Court of Oyer and Terminer of Westmoreland County commenced the trial of one John Wesley Wable, who was charged with murder in connection with the killing of a sleeping truck driver, Harry F. Pitts. The circumstances surrounding the murder of said Harry F. Pitts, and of another trucker on the Pennsylvania Turnpike, and the attempted murder of a third trucker were the subject of widespread national publicity in the newspapers, and the publicity resulted in the apprehension of John Wesley Wable in New Mexico by reason of certain disclosures which came to light in Cleveland, Ohio, particularly the identification of a watch which belonged to one of the victims, and the identification of

a gun which had been owned and possessed by the accused, John Wesley Wable.

9. At or about the time said regulation was adopted by the Courts of Westmoreland County, Pennsylvania, Howard Bud Thomas, Sheriff of Westmoreland County, announced that he would enforce said regulation by appropriate means.

10. On the first day of March 1954, the said Howard Bud Thomas, Sheriff of said County, acting under color of said regulation, both prior to and after the convening of court, stationed guards, some in uniform and some in plain clothes, at strategic points in and about the corridors and stairways of the court house, and instructed and advised reporters and news cameramen of the petitioners, and of other newspapers and news reporting agencies that if photographs were taken in the court house they would be forthwith arrested and charged with contempt of court, and requested cameramen of the petitioners and cameramen of other newspapers and of news reporting agencies upon entering the court house to deposit their cameras in the Sheriff's office before going elsewhere in the court house.

11. On March 1st, 1954, there were present in the court house approximately one hundred witnesses from different parts of the United States attending said trial, many of whom were newsworthy subjects. Said newsworthy subjects included the defendant, his family, the family of the deceased truck driver, counsel for the prosecution and counsel for the defense, the jury, the trial judge, the girl in whose home Wable had lived at the time of the commission of the offense and her

father, both of whom had given information which led to his ultimate apprehension, the pawn broker with whom the watch of one of the victims was pawned, the police officer who checked the records pertaining to the pawned watch, the deputy sheriff and other officers from New Mexico who participated in the chase and apprehension of Wable, the Pennsylvania State Police, the ballistic experts, tire mark experts, and the photographer who had made pictures of the trucks and of tire marks at the scene of the accident.

12. The petitioner, David W. Mack, on the first day of March 1954, entered the first floor of the court house in company with Castle Pyle, a news photographer, both of whom were acting for and on behalf of the petitioner, The Tribune Review Publishing Co., and the newspapers published by it, for the purpose of taking photographs of newsworthy individuals and objects in and about the court house, when they were stopped by Howard Bud Thomas, and asked whether they knew of the court order or regulation, and when told they were familiar with the court regulation, he instructed them not to take any pictures, and that if they did take pictures, they would be arrested and charged with contempt of court. The petitioner, David W. Mack, and his news photographer were on the first floor of the court house at the time said admonition was given by the said Howard Bud Thomas.

13. The petitioners aver that in the future there will be additional trials of great public interest in Westmoreland County of which the public will be entitled to be informed by photographs as well as by word description.

14. Said regulation contravenes the Fourteenth Amendment of the Constitution of the United States and deprives the petitioners of their right to gather, publish and print news, including photographic reproductions of newsworthy subjects, and amounts to a censorship of the press, and a denial of the right of free speech, and deprives the petitioners of their property and rights without due process of law, and constitutes a denial of the right of the public of Westmoreland County and elsewhere to be informed on matters of great public interest.

15. Said regulation also contravenes Articles I of Section VII of the Constitution of the State of Pennsylvania, which provides that the printing press shall be free to every person who may undertake to examine the proceedings of the legislature or any branch of government, and that no law shall ever be made to restrain the right thereof.

16. Said regulation is also in conflict with Rule 223 (d) of the Rules of Civil Procedure adopted by this Court for the conduct of business in the Courts of Common Pleas of the State; the latter rule provides that during the trial of actions the court shall prohibit the taking of photographs and motion pictures in the court room.

17. The petitioners, on March 2nd, 1954, filed their complaint in equity in the District Court of the United States, for the Western District of Pennsylvania, at Civil Action No. 12033, and upon motion, that Court entered a temporary restraining order against the therein named defendant, Howard Bud Thomas, Sheriff of Westmoreland County, enjoining the enforcement of

the regulation except in court rooms while courts were in session. A hearing was held March 8th, 1954, at which the petitioners offered testimony in support of the averments in said complaint, and the District Court, on March 12th, 1954, filed an opinion and decree continuing the restraining order in effect until March 22nd, 1954, for the purpose of giving the parties an opportunity meanwhile to apply to the Supreme Court of Pennsylvania for a writ of prohibition. A copy of the petitioners' complaint in the district Court and a copy of the opinion of the District Court of March 12th, 1954, are attached hereto and made a part hereof.

18. The P G Publishing Company, a publisher of the Pittsburgh Post Gazette, intervened in said action as a party-plaintiff.

WHEREFORE the petitioners respectfully pray that the regulation adopted by the Court of Common Pleas, the Court of Quarter Sessions, and the Court of Oyer and Terminer of Westmoreland County, Pennsylvania, be decreed by this Court to be null and void and in violation of the petitioners' rights under the Constitution of the United States and under the Constitution of Pennsylvania insofar as news photographers and news photographs are concerned, and that a writ of prohibition be issued enjoining its enforcement.

THE TRIBUNE REVIEW PUBLISHING CO. and
DAVID W. MACK,

By VINCENT R. SMITH
FRED B. TRESCHER
Attorneys.

Commonwealth of Pennsylvania }
County of Westmoreland }

DAVID W. MACK, individually, and as Vice President of The Tribune Review Publishing Co., being duly sworn, deposes and says that the facts set forth in the foregoing petition are true and correct.

DAVID W. MACK

SWORN to and subscribed before me this 16th day of March, 1954.

ANN MANIX
Notary Public

My Commission expires March 10, 1955.

EXHIBIT "A"

"No one shall take any pictures inside of the courthouse during any session of the court, or the recesses between sessions, and no person, litigant, prosecutor, defendant, plaintiff, claimant or respondent, juror, or witness shall be photographed or have his or her or their pictures taken in a courtroom or in any of the halls, corridors or approaches thereto during any session of the court or recesses between sessions, and no prisoner, or inmate of the county jail shall be photographed in the jail or in any of the approaches thereto or on his way to or from a session of court."

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IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

In the Matter of: THE APPLICATION OF THE TRIBUNE REVIEW PUBLISHING CO., a corporation, and DAVID W. MACK for a Writ of Prohibition directed to Richard D. Laird, President Judge, Edward G. Bauer, Judge, and John M. O'Connell, Judge, a majority of the Court of Common Pleas, Court of Quarter Sessions and Court of Oyer and Terminer of Westmoreland County, Pennsylvania.	No. 1950 Miscellaneous Docket

Opinion of the Court

Filed: June 29, 1954.

PER CURIAM.

The petition in this case for a writ of prohibition must be dismissed because it does not present a justiciable controversy. Such dismissal is made without prejudice as to the merits of the question presently raised or any future consideration thereof if presented in a proper case.

This court does not entertain a proceeding which seeks an abstract, academic opinion as to the constitutionality of a *statute*. It acts only in a case in which the application of the statute to an actual situation creates a cause of action which may then be asserted by a litigant affected thereby. What is thus true in regard to a *statute* is equally true of a *rule of court*.

It should be obvious that this court cannot undertake to revise or edit rules adopted by courts of inferior jurisdiction unless and until their application — not their threatened but their actual application — gives rise to a grievance subject to appellate review and remedy.

Even apart from the fact that the rule of court complained of has been revised and amended since the petition for a writ of prohibition was filed, it is clear that the particular facts and circumstances of each case might well involve different considerations as to the validity of the rule in its application, — such circumstances, for example, as the time when and place where it is desired to take photographs and the nature of the civil or criminal case being tried. Moreover, until the court, in the enforcement of a rule, deprives one of a constitutional or other legal right, no cause of action arises. And, finally, any action, whether in the nature of contempt proceedings or otherwise, which is brought to test the validity of the rule complained of, should be initiated in the court of its authorship, so that that court may itself consider and pass upon the merits of the complaint, and this court, on appeal, may be aided by its opinion.

The petition is dismissed without prejudice.

JULY 8, 1954, DISSENTING OPINION FILED BY MR. JUSTICE MUSMANNO.

Motion to Dismiss

By Mr. Trescher: If the Court please, I think we have nothing to add to what has already been offered here; all of the witnesses called were people who were named in the citation, so we have nothing in addition to offer except that I should like at this time for the purpose of the record to make a motion with reference to the defendant, David W. Mack and the defendant Robert Purdy, that the citation heretofore issued be dismissed for the reason that the regulation of the Court adopted by the Court of Quarter Sessions of Westmoreland County contravenes the Fourteenth Amendment to the Federal Constitution; also contravenes Article V of the Federal Constitution and Article I, Sec. 7 of the Constitution of Pennsylvania and Article II, Sec. 9 of the Constitution of Pennsylvania.

By Mr. Kenworthey: Could the Court give us an opportunity to file briefs on the question of the validity of the rule that we are challenging here or does the Court want us orally to argue the question?

By Judge Laird: We will grant you an opportunity to file briefs, if you desire; or to argue or both, for that matter.

By Mr. Kenworthey: We join on behalf of the other persons involved in the citation. I would like to join in Mr. Trescher's motion specifically on the two provisions of the Federal Constitution and two provisions of the Pennsylvania Constitution and also on the ground that we think, the additional ground that the Legislature acting under the Legislative power granted by the Constitution has actually occupied this field in legislating

in the Act of 1929, which I won't cite specifically and save that for my brief, which undertakes to regulate the conduct within the Court House outside the court room. For that reason we think that perhaps the effort of the Court to legislate matters and conduct of the persons in the Court House outside the court room is in direct conflict. We also take the position that the Supreme Court of Pennsylvania through its adoption of Rule 2223 has undertaken to occupy this field with regard to taking photographs and television and what not and limits it to a prohibition against taking photographs within the court room, which has precluded the power of the lower courts of Pennsylvania likewise.

Motion in Arrest of Judgment

Filed April 16, 1955.

The defendants, David W. Mack, Robert Purdy, William Block, Andrew Bernhard, Vince Johnson, James G. Klingensmith and Don Bindyke, by their attorneys. Kunkle and Trescher and Charles E. Kenworthy, move the Court to arrest the judgment in the above captioned case and assign therefor the following reasons:

1. The sentence of the Court is contrary to the terms and provisions of the Act of June 16, 1836, P.L. 784, its supplements and amendments.

2. The regulation or rule that the defendants are charged with violating is null and void in that it is contrary to the Constitution of the United States and contrary to the Constitution of Pennsylvania.

DAVID W. MACK, ROBERT PURDY, WILLIAM BLOCK, ANDREW BERNHARD, VINCE JOHNSON, JAMES G. KLINGENSMITH AND DON BINDYKE,

By KUNKLE & TRESCHER,
FRED B. TRESCHER,
CHARLES E. KENWORTHEY,
Their Attorneys.